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IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1911.

No. 36

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Plaintiff in Error,

vs.

STATE OF OREGON, Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 822.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION), PLAINTIFF IN ERROR,

vs.

STATE OF OREGON, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Preliminary.

The question raised in the opening brief filed on behalf of the plaintiff in error is there stated to be one striking at the foundations of this Government. We endeavored to present to this court the proposition that taxation by direct legislation of the people violated not only various provisions of the Federal Constitution securing to the individual the right to equal laws and due process and to government by representation, but that the initiative contravened the fundamental provisions and principles of the Constitution upon which the Federal Government itself rests. We urged that

the question seriously affected the integrity of our political system. In the reply made by the State of Oregon to that argument there is advanced a proposition no less vital, no less startling. It is said that this court having jurisdiction over the persons of the parties and having jurisdiction over the subject-matter, has yet no jurisdiction over the case because it arises under a clause of the Federal Constitution or under clauses with which this court has no concern. It is argued that though when tested by the provisions of the Federal Constitution a State initiative law may be invalid, this court has no power so to declare if the President, the Congress, and the State judiciary are content. And the most vitalizing feature of our Government, its greatest safeguard against anarchy on one hand and corruption on the other, the supremacy of this court in the interpretation of the fundamental law of the country, is denied, and the court asked to await or follow, as the case may be, the determination and action of the legislative and executive branches of the Government. The position of the defendant in error is that though this cause requires for its decision an interpretation of the Federal Constitution, it is yet not a justiciable controversy nor within the jurisdiction of this court. Neither precedent nor reason can be found for so startling a principle, a proposition no less fundamental and no less subversive than the main controversy itself.

Three clauses of the Federal Constitution at once present themselves to view. The first, "the judicial power shall extend to all cases in law and equity arising under this Constitution," and "the judicial power of the United States shall be vested in one Supreme Court;" the second, that the guarantee of the republican form of government is by the "United States," not by the Chief Executive nor by the Congress, but by the whole Government; the third, that the Constitution is the supreme law of the land. The decisions referred to by the defendant in error in nowise limit the force of these provisions as applied to the jurisdiction of this court.

The Questions Whether the "Measure" in Issue Constitutes Due Process in Law and Affords Plaintiff in Error the Equal Protection of the Law, and Whether This "Measure" in the Method of Its Enactment Violates the Various Provisions of the Federal Constitution Designated in the Opening Brief, are Contentions Which This Court Must Decide in the Exercise of Its Jurisdiction and Are Not Political.

I.

The authorities cited by defendant in error do not sustain the contention that the questions raised in the opening brief are political and not within the jurisdiction of this court.

In support of its contention that the question is political and not judicial, and that therefore the court has no jurisdiction of the cause, the defendant in error cites:

Luther vs. Borden, 7 How., 1.
Texas vs. White, 7 Wall., 730.
Taylor vs. Beckham, 178 U. S., 548.
In re Duncan, 139 U. S., 449, and
Hopkins vs. Duluth, 81 Minn., 189; 83 N. W., 536.

In *Luther vs. Borden*, 7 How., 1, the issue involved the question whether the so-called Dorr government, formed by an alleged majority of the voters of the State in 1842, superseded the government of Rhode Island under its charter as afterwards amended.

The case was argued by Mr. Webster, who took the ground that the court could not take cognizance of the question. This court adopted that view, holding that the inquiry belonged to the political department; that it rested with the political power to decide whether the charter government had been displaced or not; that when that decision was made

the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses.

It appeared that the matter had already been decided by the State court of Rhode Island, and this court said:

> "Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must, therefore, regard the charter government as the lawful and established government during the time of the contest."

It was further found that the circuit court's investigation whether or not the Dorr constitution had been adopted by a majority of the people was beyond the field of judicial inquiry. Otherwise decisions of the question, as was pointed out, would rest on the findings of juries, which might vary from case to case. As this court said: "The authority and security of the State governments do not rest on such instable foundations." The court therefore declined to support its jurisdiction on the ground that the establishment of the Dorr government violated the guaranty of a republican form of government, saying that: "Under this article of the Constitution it rests with Congress to decide what government is the *established* one in a State." (Italics ours.)

It is evident that the court here decided only that it would not declare a *de facto* government not to be a government; that the recognition by the political departments of the State and nation of the existence of a State government would bind the Federal Supreme Court; that the findings of fact upon which the conclusion was reached that one faction prevailed as the lawfully constituted authority over another faction would be accepted by the Federal tribunals.

But nowhere is it suggested that the recognition of such a government by the political departments or State courts bound the Federal courts to accept as constitutional all of the acts of that State government or to sustain as constitutional the provisions, regardless of their nature, of its fundamental law.

The whole force and bearing of the decision in *Luther vs. Borden* was epitomized in the case of *In re Duncan*, 139 U. S., 461, one of the four decisions of this court relied upon by the defendant in error. Chief Justice Fuller there said:

> "In *Luther vs. Borden*, 7 How., 1, it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government, or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department, and when that department had decided, the courts were bound to take notice of the decision and follow it; and also, that as the Supreme Court of Rhode Island, holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decision of the State courts and questions which concern merely the constitution and laws of the State."

So much was held in *Luther vs. Borden*, and no more. It was nowhere decided that the Federal courts are not a part of the "United States" and bound to uphold the guaranty clause as well as every other provision of the national Constitution.

The decision in *Luther vs. Borden* was considered by the Supreme Court of Iowa in *Koehler vs. Hill*, 15 N. W., 609. The court in that case passed upon the validity of an amendment to the constitution of the State, alleged to have been adopted in violation of the procedure provided by the *State constitution*. Upon rehearing of the case elaborate consideration was given to the contention that the question was political and not judicial. *Luther vs. Borden* was relied upon and examined and analyzed at great length. It was said:

> "The case of *Luther vs. Borden* gives no countenance whatever to the doctrine that the sovereignty of the people extends rightfully to the overturning of the constitutions, and the adoption of new ones without regard to the forms of existing provisions.

> It is true that right under our form of government, exists, but is a revolutionary and not a constitutional right."

And, still speaking of the contention that these questions should be left to the political departments of the Government, the court said:

> "We ought to ponder long before we adopt a doctrine so fraught with danger to republican institutions. All the danger lies in the line of the argument of appellants' attorneys. The courts can never overturn our institutions or subvert our liberties. They command neither the purse nor the sword of the State. But a people which is educated to disrespect the decisions and disregard the adjudications of the courts, is prepared for anarchy, with all its attendant evils and dreadful consequences. We may, perhaps, be excused, if, in the interest of social order and public security, and the permanency of republican institutions, we enter a most earnest protest against the heresies which have been advanced in this case."

The next decision in point of time cited by defendant in error is *Texas vs. White*, 7 Wall., 700. In that case the State of Texas while under provisional government sued for the recovery of bonds of the United States, which were in the State treasury at the outbreak of the war and which were disposed of by the government of the seceding State. Granting the relief sought, this court held that the State of Texas at no time ceased to be a member of the Union.

> "The first and important question was whether Texas was then one of the United States and as such capable of sustaining an original suit in this court by reason of her being such State."
>
> *Keith vs. Clark, infra.*

The court quoted from *Luther vs. Borden* that the *enforcement* of the guaranty of article IV, section 4 is for the political departments of the Government.

But it was decided by a majority of the court, Chief Justice Chase writing the opinion, that by the act of secession Texas *did not cease to be a State. This conclusion was reached, regardless of the course of Congress and of the administrations of President Lincoln and of President Johnson* with respect to the Confederate States. The court held that the Union was indissoluble and the States indestructible, and *refused to follow the decision of the political departments.*

That such was the effect of the decision was pointed out by Mr. Justice Grier, in a dissenting opinion, who said:

> "I can only submit to the fact as decided by the political position of the Government, and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided she is not. *It is a question of fact, I repeat, and of fact only.* Politically Texas is not a State in this Union."

And Mr. Justice Swayne said:

> "I concur with my brother, Grier, as to the incapacity of the State of Texas in her present condition to maintain an original suit in this court. *The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the Government.* * * * I am authorized to say that my brother, Miller, unites with me in these views."

But the majority of the court held that it was the exclusive province of the courts to determine the legal effect of the acts of secession—a ruling followed in subsequent cases (*White vs. Hart,* 13 Wall., 646; *Keith vs. Clark,* 97 U. S., 461; *Daniels vs. Tearney,* 102 U. S., 418).

The case lends no support to the position that decisions on the constitutionality of State governments are controlled by the acts of the executive or legislative branch of the Federal Government, but makes clearer the distinction between *executive and administrative enforcement* of the guarantee

on the one hand and *judicial interpretation* of the clause on the other hand; and from the language of Mr. Justice Grier it is clear that the minority in *Texas vs. White* dissented on the ground that the question was one of *fact*, upon which the proper political departments had acted. Will it be claimed that in this case the question whether direct legislation violates a republican form of government is a question of fact? What votes are here to be counted, as in *Luther vs. Borden?* What legislative journals to be referred to, as in *In re Duncan?* What legislative canvass to be examined, as in *Taylor vs. Beckham?*

In re Duncan, 139 U. S., 449, is cited and referred to by defendant in error.

In that case the petitioner appealed from a judgment of the Circuit Court of the United States for the Western District of Texas, denying a writ of *habeas corpus* to discharge him from custody, after his conviction in the State courts of the crime of murder. The grounds of the petition were that the penal code under which the petitioner was tried in the State courts had not been adopted pursuant to the requirements of the State constitution. The State court held that the statutes in question had been enacted in accordance with the provisions of the State constitution, and that the Federal courts would not review the findings or decision of the State court in that respect. "This is not the case," said Chief Justice Fuller, in delivering the opinion of the court, "of a system of laws attacked upon the ground of their invalidity as the product of revolution."

And so pertinent to the question here at issue is the language of the Chief Justice in that case, and so clearly does it distinguish that case from the case at bar, that at the expense of repetition we quote the language there used:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for

governmental administration, and pass their own laws *in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves;* but, while the people are thus the source of political power, their governments, *National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own powers, as against the sudden impulses of mere majorities.*

"In *Luther vs. Borden,* 7 How., 1, it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government, or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department, and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that, as the Supreme Court of Rhode Island, holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the constitution and laws of the State. Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution or any right of

> revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions. Webster's Works, vol. 6, p. 217.
>
> "Discursive as are the views of petitioner's counsel, *no violation of these fundamental principles in this instance is or could be suggested.*
>
> "The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, *and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction.*
>
> "We cannot perceive that petitioner is being otherwise dealt with than according to the law of the land." (Italics ours.)

These are not the premises in hand.

Testing the question now before the court by the language used in that case we observe that the greatest "violation of fundamental principles is (here) suggested." Under the amendment to the Oregon constitution, the legislative department is *not* operating "by the orderly and well-settled methods prescribed by the fundamental law." "*The exercise of governmental powers immediately by the people themselves*" *is here not recognized as impracticable.* Under the initiative amendment "each man's power" does *not* tell "in the enactment of laws"; "the regular action of popular power" is *not* "taking place" and ascertained in accordance with "legal and authentic modes," and the plaintiff in error claims that in this case it "*is* being otherwise dealt with than in accordance to the laws of the land."

There remains for consideration the case of *Taylor vs. Beckham*, 178 U. S., 548.

The action was in *quo warranto* for usurpation of office.

After an adverse decision by the Supreme Court of Kentucky the petitioners brought the cause to this court on writ of error.

The contention was that an election contest in which the petitioners were the contestants was decided by the general assembly of the State in violation of the contestants' constitutional rights. The contest was heard under a statute giving the general assembly jurisdiction over election contests. The constitutionality of the statute was not assailed. But it was claimed that the petitioners had been deprived by the general assembly of their right to office without due process of law, and that the action of the general assembly deprived the people of the State of a republican form of government and of their political liberty without due process of law. The majority of this court held that the petitioners were deprived of no property right by the adverse determination of the legislative assembly of their right to office; that "the decision of these contested elections did not deprive plaintiffs in error of any pre-existing right" and that the judgment of the Court of Appeals (of the State) in declining to go behind the decision of the tribunal vested by the State constitution and laws with the alternate determination of the right to these offices denied no right secured by the 14th amendment." And refusing to interfere on the claim that the determination of the legislative assembly violated the guarantee of a republican form of government, the majority of this court declined jurisdiction, pointing out that the constitutional and statutory agencies of the State of Kentucky had acted in the manner provided by the constitution and statutes of the State. No claim was there made as in this case *that the constitution or statutes in themselves violated the Federal Constitution*, or that they rendered a valid exercise of governmental power impossible.

Leeper vs. Texas, 139 U. S., 462, cited at page 6 of the brief for the defendant in error, presented a question similar to that before the court in the case of *In re* Duncan, and the

decision was rested largely on the decision in the latter case. Chief Justice Fuller speaking for this court said:

> "We find nothing special, partial or arbitrary or in violation of fundamental principles in the criminal laws of the State of Texas involved."

And the court affirmed the judgment.

No one of these decisions touches the question whether State laws affecting the life, liberty or property of citizens of the United States, and enacted in violation of the basic principles of a republican form of government, may be enforced without the right of recourse to the national courts. In all of them, as an examination discloses, the issues involved were questions of political fact.

II.

The courts have never held that a cause was not justiciable because it involved an interpretation of article IV, section 4, but have in proper cases construed the language of that clause.

In all the cases, both those cited by defendant in error, and those by us referred to, in which the validity of a statute or constitutional provision was drawn in question on the ground of a violation of the form of a republican form of government, *the courts exercised jurisdiction and passed on the question.* All of the authorities cited by counsel at pages 30-31 under paragraph II of their brief, are in conflict with their argument that this court has no jurisdiction over the question even when confined to the narrow limits within which counsel restrict it. We contend and endeavor to show that the rights of the plaintiff in error under the fourteenth amendment are violated by the tax attempted to be levied by the measure in question. We further urged the unconstitutionality of the pretended tax by reason of the

fact that various provisions of the Federal Constitution were violated in the method of its enactment. Counsel assails this court's jurisdiction to interpret one of these provisions, to wit, that guaranteeing a republican form of government. But in the cases cited by the defendant in error the courts *did* consider the meaning of the words "a republican form of government" and passed upon the very question over which it is urged they had no jurisdiction.

In *Chisholm vs. Georgia*, 2 Dall., 419, this court gave the definition already mentioned.

In the case of *In re Duncan*, 139 U. S., 449, the court gave the definition quoted by us at page 25 of our brief.

In *Hopkins vs. Duluth*, 81 Minn., 189, the Supreme Court of Minnesota examined into the meaning of the phrase and held that the submission of *local charters* to popular vote was not inconsistent with a republican form of government, nor the referendum on any matter involving a change of government. But nowhere was there an intimation that the court had not the power to review the question.

In re Pfahler, 150 Cal., 71, and in *People vs. Sours*, 31 Colo., 369, the courts held that direct legislation by the people in municipal affairs in the one case and a constitutional provision for municipal home rule in the other, are not inconsistent with the republican form of government which the States are required to maintain. In neither opinion did the court deny its power to interpret the language of article IV, section 4, of the Federal Constitution.

In the three cases from the Supreme Court of Oregon, including the one at bar, the contentions that the initiative amendment to the Oregon constitution was invalid were not admitted; the constitutional amendment here assailed was held to be republican in form; but the jurisdiction of the court over the question was exercised and not denied.

In the *Kadderly* case, 44 Or., 118, the decision was rested largely on the ground that the governor's veto power pre-

served some measure of representation in legislation, the court saying that "unless, therefore, he has a right to veto any act submitted to him, except such as the legislature may specially refer to the people, one of the safeguards against hasty or ill-advised legislation which is everywhere regarded as essential is removed." But in *State vs. Kline*, 93 Pacific, 236, it was held that "the Chief Executive of the State is powerless either to approve or repudiate a measure passed in this manner;" and when we pointed out to the State court in this case that the measure here involved had not been submitted to the executive for approval, and that under the initiative amendment the governor's veto power did not extend to enactments by the people, the court, though unable to adhere to the premises on which its views were based, adhered to its conclusion. And, in passing, we note that what was said in the Kadderly case about the governor's veto power, quoted by defendant in error at pages 35 and 36 of its brief, was recalled by the court, on the authority of *State vs. Kline* (*supra*), in the opinion written in this case.

The Supreme Court of Colorado has in several cases reviewed the question whether the provision in the Federal Constitution guaranteeing a Federal form of government is violated by an amendment to the State constitution which withdraws from the control of State agencies any given portion of the State. It was held in *People vs. Sours*, 31 Colo., 369, that the amendment to the State Constitution merely "secured to the people of Denver absolute freedom from interference in matters of local concern;" and such a provision was held not repugnant to the Federal Constitution or to article IV, section 4, thereof. It was decided in *People vs. Johnson*, 38 Colo., 76; 86 Pac., 233, that the amendment conferred no powers of legislation upon the city and county of Denver in State affairs, and that the contrary construction would violate the requirement of the Constitution of the United States that a republican form of gov-

ıent be maintained. (*Elder vs. Colorado*, 86 Pac., 250, decided on the authority of *People vs. Johnson*, taken his court on writ of error. This court dismissed the writ rror on the ground that the interpretation given by the e court to the State constitution sustained the claim of lidity of the amendment under the provisions of article section 4, of the Federal Constitution. *Elder vs. Colo-o*, 204 U. S., 85.)

n the Johnson case the court said:

> "The question is: Can the people of the State, by constitutional amendment set apart any portion of the State and vest the citizens thereof with power to legislate upon matters other than those purely local and strictly municipal in their character? In the Sours case this court has said that this could not be done, for the reason that such act would be subversive of a republican form of government, repugnant to the Constitution of the United States, and violative of the compact existing between the State and Federal Government. * * * To concede the right to legislate upon such matters in the slightest particular must be to concede the right to legislate on all matters," etc., etc.

It is apparent that in the cases involving the question, e Supreme Court of Colorado has not hesitated to exercise s jurisdiction and to decide what is, and what is not, con-stent with a republican form of government.

In still more marked contradiction of the view of the de-ndant in error as to the jurisdiction of this court, is the uotation from the decision in *Minor vs. Happersett*, 21 Wall., 32 (brief of defendant in error, pp. 30, 32). Though it urged by the defendant in error that the question whether ıe Oregon amendment violates a republican form of gov-rnment is a political one, and that the interpretation of rticle IV of section 4 of the Federal constitution, is for ongress and the President, we find that in *Minor vs. Hap-ersett* this court was called upon to "ascertain what was

intended" by the phrase "republican form of government." And, as pointed out in our opening brief (page 93), the court, finding that it was compelled to look beyond the Constitution to determine the meaning of the phrase, found in the governments existing at the time of the adoption of the Constitution "unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution." There was here no question about the jurisdiction of this court, but an important exercise of its power to interpret the Federal Constitution. And in other cases where occasion has arisen this court has for itself examined the Federal Constitution to determine the meaning of the language in article IV, section 4.

Thus in *Forsyth vs. Hammond*, 166 U. S., 519, the courts of Indiana having sustained their jurisdiction over a determination of a petition to enlarge territorial boundaries of a municipal corporation, Mr. Justice Brewer, in rendering the judgment of this court sustaining the holding of the State courts, said:

> "There is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which under section 4 of article IV of the Constitution the United States are bound to guarantee to every State in this Union."

It was not questioned here that this court could not test the validity of the decree of the State courts by interpreting the language of this clause of the Constitution. There was no denial of the jurisdiction and duty of this court to determine the "essential elements of a republican form of government."

See also *South Carolina vs. U. S.*, 199 U. S., 437, 454.

In *Kies vs. Lowrey,* 199 U. S., 167, a State statute provided for the creation of a new school district. It was urged that this was an interference with the right of local government which would not be denied without violating the constitutional provision for a republican form of government.

Mr. Justice McKenna, speaking for the court, said:

> "The action of the legislature is compatible with a republican form of government,"

though the applicability of article IV, section 4, to the case was questioned. But no intimation is found in the opinion that this court had no power to pass on the validity of the State statute under this section of the Federal Constitution, or to determine the meaning of the clause, or to decide what is and what is not "compatible with a republican form of government."

In the case at bar also the meaning of the provisions of article IV, section 4, is brought into question, together with numerous other clauses of the Constitution. It is submitted that this court cannot refuse to interpret the Federal Constitution or any clause thereof in any cause where such interpretation is essential to the determination of a right asserted by a litigant properly before the court. The meaning of the Federal Constitution will determine whether plaintiff in error is entitled to the relief here sought; whether the judgment rendered in the State courts enforces due process of law. Only this court can construe the clauses of the Federal Constitution upon which the decision of this controversy depends, and we submit that this court cannot refuse so to do.

The right to a republican form of government is a substantial right. Like the franchise to vote, it is a political right. But this has always been held to be within the protection of the courts.

In *Capen vs. Foster,* 12 Pick., 485, 489, Chief Justice Shaw declared that the Constitution clearly conferred upon

And the eminent statesman to whom we referred in our opening brief summed up this proposition in the following pertinent words:

> "Any question arising in a legal proceeding as to the *meaning and application* of this fundamental law (the Federal Constitution) will evidently be settled by the courts of law. Every court is equally bound to pronounce and competent to pronounce on such questions, a State court no less than a Federal court; but as all the more important questions are carried by appeal to the Supreme Federal Court, it is practically that court whose opinion determines them."
>
> 1 Bryce Am. Com., p. 365. (Italics ours.)

See also

Consolidated Gas Co. vs. Willcox, 212 U. S., 19, 40.

And in the case of *Cohens vs. Virginia* (*supra*) the Chief Justice again said:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

It was pointed out in the argument of that case that there were many infractions of the Constitution possible which would yet not be within the reach of the arm of this court; that, therefore, the court was not the sole interpreter of the Constitution. The Chief Justice answered that contention as follows:

> "This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend."

III.

The action of Congress in receiving Senators and Representatives from Oregon and its approval of a constitution containing the initiative as providing a republican form of government does not control this court in the construction of the language of the Oregon constitution, or in passing upon the validity of any provision of or amendment to that constitution.

It is asserted in the brief for the defendant in error that so long as the Executive does not object, and while Congress admits to its membership the representatives of a State, the government of that State is thereby recognized as constitutional and as republican in form; that this has been and is being done in the case of Oklahoma and in the case of Oregon, and that it is a determination of the question binding upon this court. Then, assuming a contrary disposition on

the part of the Congress and the President, how would the political departments nullify such "legislation" as this? Would it be by manifesto of the President? Would Congress eject Senators and Representatives from the National legislature because of the adoption of an invalid amendment to a State constitution? And if the Senators and Representatives of the offending State were thus ejected, would the State be out of the Union? Is not every State perpetually bound to its membership in the Union? How else is obedience to the law or protection against the enforcement of invalid legislation secured in our Government than by the courts?

Defendant in error points out at page 12 of its brief that "it is not a decision upon one clause of the Constitution, but the whole instrument is examined and considered and the plan or scheme of government there outlined adjudged to be republican or unrepublican in character. That is as far as Congress attempts to go, &c."

The preamble of the President's message declaring Oklahoma a State is quoted as containing a recital that the constitution and government of the proposed State of Oklahoma "are republican in form." It is said that the admission by Congress of Oklahoma on these terms is a finding that the government is republican in form. Does any one contend that this recital by Congress or by the President, or by both, deprives this court of its jurisdiction to determine whether one or more clauses or provisions of a proposed constitution conflict with the Federal Constitution? Is it argued that the validity under the Federal Constitution of an amendment to the constitution of a State already in the Union is beyond inquiry or is beyond examination by this court merely because the amendment contains a provision similar to that of a constitution of a State approved by Congress? Is this court deprived of power to determine whether the Oregon amendment conflicts with the Federal Constitution because provisions similar to that amendment are found in con-

stitutions with which new States have been admitted to the Union? We think not.

In the case of *Gunn vs. Barry*, 12 Wall., 610, the Georgia constitution of 1868 provided for homesteads against which judgments for debts were not enforcible. It was held by the State court that this provision and the provisions of the State statute of October 3, 1869, enforcing the constitution applied to judgments rendered before the adoption of the constitution of 1868. The claim that the constitutional provision impaired the obligation of contracts was met by the answer that Congress had approved the State constitution. Disposing of this contention, Mr. Justice Swayne said:

> "Though her constitution was sanctioned by Congress this provision can in no sense be considered an act of that body. The sanction was only permissive as part of the process of her rehabilitation and involved nothing affirmative or negative beyond that event. If it were express and unequivocal the result would be the same. Congress cannot by authorization or ratification give the slightest effect to a State law or Constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States and is alike obligatory upon both."

It is apparent that what Congress cannot do by affirmative legislation, it could not accomplish by mere inaction.

The Homestead cases, 22 Gratt., 266, involved the validity of a provision of the constitution of Virginia adopted in 1868, exempting homesteads from execution and levy for antecedent debts. Congress having approved the constitution, Virginia's representatives were readmitted to Congress under the reconstruction acts. It was urged that the approval of the new constitution by Congress bound the courts. To this the court said:

> "It is true that, under the act of March 1867, the approval of the constitution by Congress was required before the State should be entitled to representation.

> The effect of withholding its approval would have been to continue the military government to which the State was then subjected. But when the constitution was approved, the senators and representatives elected under it admitted, it then became the organic law of this State, binding upon all the citizens of the State and all departments of the State government organized under it, except *so far as any* of its provisions may be in conflict with the Constitution of the United States (p. 285).
>
> "* * * It is further insisted by the counsel for the appellants, that the present constitution of Virginia, having no validity under the reconstruction laws, until approved by Congress, must be regarded as a law of Congress; and that therefore, the inhibition of the Constitution of the United States which is upon the *States*, and not upon Congress, has no application" (p. 284). (Italics ours.)

Demonstrating the fallacy of this argument the court proceeded:

> "But suppose the constitution of Virginia could, in any view, be considered an act of Congress, then I deny that Congress can violate the Constitution of the United States any more than a State. That Constitution is the 'supreme law of the land,' paramount in its obligation and binding force upon all departments of government, State and Federal; upon the national legislature as well as the State legislatures; upon the judicial and executive, as well as upon the legislative departments of both Federal and State governments; upon the whole people, governing and restraining their acts and conduct, whether exercised by their representatives in the National Congress, or by their representatives in State conventions and State legislatures. It is to each and all the supreme law of the land.
>
> "It would be a monstrous fallacy to hold, either that Congress can authorize a State to do that which the constitution of the United States prohibits a State from doing, or that Congress may itself supersede the National Constitution."

Now it is not apparent that if the congressional approval of a State constitution is binding "except so far as any of its provisions may be in conflict with the Constitution of the United States," it is also binding only so far as the provisions of the State constitution do not conflict with the requirements of the only form of government permissible under the Federal Constitution—to wit, the republican form. This court is not asked to declare that not to be a State which Congress and the President have recognized as such; nor to deny the right of senators and congressmen to sit whom Congress has admitted. Such is not as counsel seem to think the issue here. Our contention merely demands of the court that it pronounce that article, clause, provision or phrase of the State law invalid which in its judgment violates one or more provisions of the Federal Constitution.

And here it may be observed that no peculiar restrictions limit the judicial authority when exercised with reference to congressional acts of admission. They are legislative acts as much subject to review for a proper determination of their conformity to the Federal Constitution as are any other enactments. Recently this court considered the powers of Congress in this regard in *Coyle vs. Smith*, 31 Sup. Ct. Rep., 688, decided May 29, 1911. It was there held that certain restrictions in the enabling act admitting Oklahoma to the Union were unconstitutional because void for want of power. The power of Congress to admit new States, and its function of seeing that the forms of government were not changed to anti-republican forms were not denied; but it was held that the power was nevertheless a limited power; its exercise was in that case reviewed by this court; and it was held that the limitations upon the power had been transgressed. The proposition that the power was a political one was not denied; but this fact did not oust the jurisdiction of this court to determine whether it had been constitutionally exercised.

Mr. Jusice Lurton, speaking for the court, said:

> "But what is this power? It is not to admit political organizations which are less or greater or dif-

> ferent in dignity or power from those political entities which constitute the Union. It is strongly put by counsel as the power to admit States."

And what authority, we ask, determines whether Congress has in point of fact attempted "to admit political organizations which *are less or greater or different* in dignity or power," if it be not this court? Manifestly to make that determination this court must itself examine the political organizations admitted to the Union and claimed to be different or less or greater. And just as this court declined to be bound by the legislative finding that the enabling act admitting Oklahoma to the Union conformed to the Federal Constitution and gave the new State an equal standing in the Union, so here we invoke the court's jurisdiction to review the validity of provisions of the Oregon constitution, despite the facts that the President and Congress have, by implication, accepted these provisions as conforming to the Federal Constitution and as not differing from a republican form of government.

The prerogatives of Congress, which defendant in error speaks of in the first paragraph of its reply brief, were not involved in the Oklahoma case, far less in the case at bar. In the former case this court was not called upon "to decide whether it (Oklahoma) should become a member of the Union" (brief for defendant in error, p. 18). Nor in this case is the court required to determine whether Oregon may remain in the Union. The question of repugnancy of a single provision of the enabling act to the Federal Constitution was at issue in the former case, and in this case it is the validity of a single provision in the Oregon constitution that is involved.

But it is said "If the courts take jurisdiction of these questions, then we have a decision upon a political question, decided by the political power, re-examined by the judicial and perhaps overthrown. One branch of the Government becomes arrayed against another and revolution or

ebellion is imminent" (brief of defendant in error, p. 12). The argument is strangely reminiscent of General Jackson's famous defiance, "John Marshall has pronounced his udgment. Let him enforce it if he can." Such is not yet he spirit or temper of the people of this country. Nor is he suggestion one which has received the approval of this ourt. It was made and answered in the case of *McPherson s. Blacher*, 146 U. S., 1. The court there recognized that he United States Government consists of three departments, he legislative, executive, and judicial. All are sworn to uphold the Federal Constitution. Each department, when alled upon, must exercise the functions ascribed to it.

The case involved the validity of an act of the Michigan egislature regulating the choice of presidential electors.

> "It is argued," said the court, "that the subject-matter of the controversy is not of judicial cognizance because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them, and that its decision would be subject to review by political officers and agencies as the State board of canvassers, the legislature in joint convention, and the governor; or, finally, the Congress.
>
> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and the laws of the United States, and this is a case so arising, since the validity of a State law was drawn in question as repugnant to such Constitution and laws and its validity was sustained" (p. 23).

And again:

> "The question of the validity of this act as presented to us by this record is a judicial question *and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State, as revised by our own*" (p. 24). (Italics ours.)

The courts are the final interpreters of the Constitution, and as they pass upon the constitutional powers of the legislatures and executives of the Nation and of the States, so must they, when called upon, exercise their functions and determine the validity of the acts of the people of a State, so far as they affect the constitutional rights of the citizens or the powers of the National Government; for, as was said by Chief Justice Chase:

> "* * * the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."
>
> *Texas vs. White*, 7 Wall., at page 725.

More recently this court, through Mr. Justice Harlan, spoke on this subject as follows:

> "The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."
>
> Smyth *vs.* Ames, 169 U. S., 527.

IV.

The court has jurisdiction because the Oregon amendment providing for the initiative and the "measure" in question deny due process of law and the equal protection of the law.

In the opening brief (pp. 35-45) plaintiff in error invoked the jurisdiction of the court against an infraction of its right to due process of law and the protection of equal laws.

We submitted that the "measure" in question, neither in the manner of its enforcement nor in its enactment, constitutes due process of law; nor can it be the basis of due process; and neither the conclusions of the State court nor of Congress could bind this court in determining whether plaintiff in error has been accorded its rights under the Fourteenth Amendment.

In *Davidson vs. New Orleans*, 96 U. S., 97, Mr. Justice Miller, speaking for the court, said:

> "Can a State make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail or has no application where the invasion of private rights is effected under forms of State legislation."

And Mr. Justice Peckham observed in *Allgeyer vs. Louisiana*, 165 U. S., 578, that an unconstitutional statute does not become due process of law. The question here raised was decided in a case extremely similar to the one at bar, *Southwestern Tel. & Tel. Co. vs. City of Dallas*, decided by the Supreme Court of Texas, February 15, 1911, and found in 134 S. W., 321.

The question arose upon the validity of an alleged ordinance initiated by the voters of the city of Dallas and adopted by their vote. The power was exercised under a provision of the charter of the city that—

> "Any proposed ordinance may be submitted to the board of commissioners by a petition signed by registered electors of the city equal in number to the percentages hereinafter required."

Answering the contention of the municipal counsel thaat the language used intended to include ordinances on any subject of legislation, the court said:

> "We are of opinion that the language 'any proposed ordinance' means that an ordinance upon any subject to which the initiatory method is applicable may be presented in the manner prescribed to the commissioners. It does not mean that all ordinances upon any subject of legislation mentioned in the charter may be enacted in that manner."

And calling attention to the provisions of the charter by which the board of commissioners who constitute the governing body of the city of Dallas are empowered to determine, fix and regulate charges after a fair hearing on the reasonableness of rates, the court said:

> "In the exercise of the power to regulate and fix rates, etc., there must be a body who can hear evidence and decide upon the reasonableness or unreasonableness of the rate or regulation, and if that cannot be done by the initiative—the popular vote—then, the authority cannot be exercised in that manner. Can it be necessary to offer argument to show to any man that such hearing as the law provides could not be had in a campaign before the electorate of the city? It is too manifest for controversy.
>
> "Can it be supposed that a legislature would require a board of commissioners to secure a fair hearing to the party to be affected, and yet would permit some unknown party to draft an ordinance, specifying rates and regulations, without the knowledge of any facts, and submit such ordinance to the popular vote where there can neither be an investigation nor any character of ascertainment of the facts? That would be to place upon the language of the charter an unreasonable construction. If the charter provided for the

submission of such issues to the voters at large, its validity would, at least, be questionable,"

iting *Tel. Co. vs. Los Angeles*, 211 U. S., 280, and holding hat a fair hearing was not had and could not be had in the doption of the ordinance by popular vote. The court held he ordinance void, and the grounds of that decision apply ith far greater force to a measure levying a rate upon the ross earnings of a public service corporation and acted upon olely by the votes of the electorate of an entire State.

The power to impose taxes has in our Government always been vested exclusively in the legislative department. It is a political axiom that the taxing power must be exercised by the legislative arm of the Government or by its authority.

See our opening brief, pages 37 *et seq.*

"The power of taxation," said Chief Justice Waite, "is legislative, and cannot be exercised otherwise than under the authority of the legislature." *Meriwether vs. Garrett*, 102 U. S., 472, 501.

And in *Heine vs. The Levee Commissioners of New Orleans*, 19 Wall., 655, Mr. Justice Miller, delivering the opinion of the court, said:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State and National. * * * The power must be derived from the legislature of the State."

And see

Munday vs. Rahway, 43 N. J. L., 346.
Cooley, Taxation, 32, 34.

In *Spencer vs. Merchant*, 125 U. S., 345, 355, this court said:

> "The power to tax belongs exclusively to the legislative branch of the Government."

And, quoting the language of Chief Justice Chase, Mr. Justice Gray continued:

> "The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the court but to the people by whom its members are elected."

We claimed in our opening brief that government by the people directly is government without representation. This is practically conceded by the defendant in error. It is not claimed that the initiative does not subvert the representative principle in government. If this be so, then taxation by direct vote of the people is taxation without representation. Whether the concrete right to notice and a hearing before the legislature must be accorded to every citizen before a taxing statute is passed (*Williams vs. Eggleston*, 170 U. S., 304), the act of the legislature is in all cases the act of the representatives of the people who are taxed. The right of petition and hearing before the legislature is an inherent attribute of citizenship (*U. S. vs. Cruikshank*, 92 U. S., 542), and through its exercise every person taxed can demand a hearing. In any event taxation by the ballot of the majority violates each and all of these conditions. It is taxation without a possible hearing, without a possible right of petition, and without representation, and for these reasons it is not due process of law.

It has been observed that the guarantee of equal protection of the law is a guarantee of the protection of equal laws.

Southern Railway Co. vs. Greene, 216 U. S., 412.
Yick Wo vs. Hopkins, 118 U. S., 369.

We pointed out in our opening brief that in Oregon no class of persons other than corporations engaged in six different kinds of business are taxed by the initiative method. The following language from *Yick Wo vs. Hopkins* appropriately describes the situation in the case at bar:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The unconstitutionality of the acts of a State are equally within the jurisdiction of the courts, whether they be the acts of the legislative or executive department or of the people themselves, adopting their constitutions or amending them.

Cohens vs. Virginia, 6 Wheat., 415.
Dodge vs. Woolsey, 18 How., 332.
Cummings vs. Missouri, 4 Wall., 277.
Cooley, Const. Lim., 7th ed., p. 62.

In *Koehler vs. Hill* (*supra*), the court said:

"It is well that the powers of the people and their relations to organized society should be understood. *No heresy has ever been taught in this country so*

fraught with evil as the doctrine that the people have a constitutional right to disregard the constitution, and that they can set themselves above the instrumentalities appointed by the constitution for the administration of law. It tends directly to the encouragement of revolution and anarchy. It is incumbent upon all who influence and mould public opinion to repudiate and discountenance so dangerous a doctrine before it bears fruits destructive of republican institutions. It will be well if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty" * * * (15 N. W., 615-616).

"We have approached and discussed this grave question with a full appreciation of the responsibilities which it involves, and we have given to its consideration the earnest attention which its importance demands. We have sought to maintain the supremacy of the Constitution at whatever hazard. *It is for the protection of minorities that constitutions are framed. Sometimes constitutions must be interposed for the protection of majorities even against themselves.* Constitutions are adopted in times of public repose, when sober reason holds her citadel, and are designed to check the surging passions in times of popular excitement. But if courts could be coerced by popular majorities into a disregard of their provisions, constitutions would become mere 'ropes of sand,' and there would be an end of social security and of constitutional freedom" (p. 630). (Italics ours.)

In the *Homestead cases* (*supra*) the Supreme Court of Virginia said:

"And where the legislative will, *or the popular will declared in the solemn form of a constitution, is in contravention of the supreme law of the land, the judicial department must uphold that law,* and unflinchingly guard it as inviolable. This principle and this duty grow out of no superiority, which the judicial department of the Government claims over

the legislative, but is inherent in the very nature and form of our system of government" (p. 280). * * * (Italics ours.)

"It has been well settled by the adjudications of the Supreme Court of the United States, that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibitions they are substantially the same thing" (p. 282).

V.

Authorities cited by Defendant in Error as to the Meaning of the Phrase "A Republican Form of Government."

We find on page 23 of the reply to our brief a number of citations made to support the claim that a government in which the power of direct legislation is vested in the people is republican in form.

The proposition that direct government in local affairs is constitutional under the Federal Constitution (*People vs. Sours,* 31 Colo., 369, *Ex Parte Pfahler,* 150 Cal., 71; *Hopkins vs. Duluth,* 81 Minn., 189), was discussed by us and the principle not controverted (opening brief, pp. 102, 177).

And in *Kies vs. Lowrey,* 199 U. S., 233, as we have already pointed out, Mr. Justice McKenna, speaking for the court, expressed a doubt as to whether the provisions of article IV, section 4, could be invoked in cases involving the "creation of, or the powers or rights of property of the subordinate municipalities of the State."

The Oregon cases cited by defendant in error, including the opinion in this case, were all referred to by us. Though not in accord as to some of the material reasons for the conclusions reached, the Oregon Supreme Court and the Supreme Court of Oklahoma have upheld the validity of direct legislation (*Ex Parte Wagner,* 21 Okl., 33, 36). The

opinion in the latter case contains little analysis of the question.

Kring vs. Missouri, 107 U. S., 221, cited by counsel for defendant in error has no apparent relevancy, we respectfully submit, to the case at bar. It was there held that a change in the criminal procedure of the Missouri courts was an *ex post facto* law so far as the petitioner in the case was concerned, and its application to his case, unconstitutional.

Hopkins vs. Duluth, 81 Minn., 189, was an election contest.

Chisholm vs. Georgia, 2 Dallas, 419, has, we also submit, no bearing on this case. It is apparently cited for the statement by Judge Wilson, found at page 25 of the brief of defendant in error.

We do not oppose the proposition advanced by learned counsel that a republican government is one in which "the supreme power resides in the body of the people." But that is far from saying that the people themselves shall directly exercise this power; and in our opening brief we endeavored to point out the difference (pp. 13-27, 75, 144). It is the difference between a republic and a democracy. And the definition by Justice Wilson, so much relied upon by the defendant in error, would be equally appropriate when applied to a pure democracy.

The other authorities cited by defendant in error are discussed by us herein, or were referred to in our opening brief, except the observations of Mr. Oberholtzer, with which we are constrained to disagree.

The cases cited at pages 30-31 of the brief for defendant in error are all found in the list at page 23, already referred to.

It is suggested in the remarks of C. E. S. Wood, Esq., found as an addendum at pages 54 *et seq.* of the brief for defendant in error, that Hamilton was the author of article IV, section 4, of the Constitution (p. 58), and "battled for

its adoption" (p. 60). The further statement that the clause was "adopted by Hamilton in his plan from Randolph's draft first submitted," is, we believe, historically more accurate.

In point of fact, it was offered to the convention on May 28, 1787, as the eleventh of Randolph's resolutions. Charles Pinckney's plan, submitted the same day, did not contain the provision. (*Elliott's Debates*, vol. V, pp. 128-132.) On June 18, 1787, Hamilton, "who had hitherto been silent on the business before the convention," in a celebrated speech presented a sketch containing eleven propositions, of which this clause was not one (*Elliott's Debates*, vol. V, pp. 198-205); though his completed plan handed to Madison at a later date, shortly before the adjournment of the convention, was, according to Hannis Taylor, read to the convention and contained the clause as article IX, section 8. (Hannis Taylor's "Origin and Growth of the American Constitution," Appendix, p. 568.)

But we find in none of these speeches or writings of Hamilton evidence that he was "battling" for the revolutionary principles of direct legislation. No one detested more than he the form of government which this court is now asked to sanction; no one distinguished more clearly than Hamilton between the republican and democratic form of government or was more thoroughly alive to the destructive forces of a government the administration of which is attempted directly by the multitude. It can serve no purpose to again refer to those writings which contain Hamilton's views. We endeavored to collate them in our opening brief.

VI.

Conclusion.

We respectfully submit that in our opening brief we offered abundant evidence of the meaning of the phrase "republican form of government" as understood by the

framers of the Constitution and by the people of the States when they adopted it as their fundamental law. As remarked by Mr. Justice Brewer in *South Carolina vs. U. S.*, 199 U. S., p. 448:

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."

Recognizing that its elasticity yet permits the Constitution to embrace "in its grasp all new conditions which are within the scope of the powers in terms conferred," and that "while the powers granted do not change they apply from generation to generation to all things to which they are in their nature applicable," the learned justice concluded that "this in no manner abridges the fact of its changeless nature and meaning." Defendant in error urges that no question of expediency can be weighed in this case. With no less earnestness we urge the same argument. And the language adopted by Mr. Justice Brewer in the same opinion (p. 449), with reference to the Federal Constitution here seems apposite:

> "As long as it continues to exist in its present form it speaks not only in the same words but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and approved by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day."

In conclusion, we submit that the validity or invalidity of direct legislation under our system of government and under the Federal Constitution, designed to perpetuate that system of government, must in the last instance be decided by this court. We assert that direct legislation by the people in State or National affairs violates the principle of representation, the cardinal principle of the form of government

adopted in this country, and impairs the component parts, if indeed it does not destroy the most essential part of the structure upon which rests the Federal Government. We confidently contend that the Federal Constitution expressly and by implication prohibits such a form of government either in the States or in the Nation. In the language of Chief Justice Marshall, in the famous case above referred to, *Cohens vs. Virginia:*

> "If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of the court to say so; and to perform that task which the American people have assigned to the judicial department."

It is respectfully submitted that the judgment of the Supreme Court of the State of Oregon should be reversed.

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Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 8222

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

THE STATE OF OREGON,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE.

An action at law was brought in the Circuit Court of the State of Oregon for Multnomah County by the State of Oregon, defendant in error, plaintiff therein, against Pacific States Telephone & Telegraph Company, plaintiff in error, defendant therein, to recover the sum of $10,450.68, alleged to be due and owing the State of Oregon from the corporation, under the pro-

visions of what is known as the Gross Earnings Tax Law, the same being a law enacted by the people of the State of Oregon by the initiative method June 4th, 1906, and promulgated by the Governor of the State of Oregon by proclamation, dated June 25, 1906, from which date it has been in full force and effect, and is published as Chapter 1 of the Session Laws of 1907, and set forth in full in the answer, pages 5, 6 and 7 of the Transcript of Record.

Complaint, page 2 of record.

The answer of the defendant (plaintiff in error herein) admits that it is a corporation, as alleged, and that it furnished the report referred to in the complaint, and that the volume of its business within the State of Oregon, June 25, 1906, to January 1st, 1907, was as stated therein, and that 2 per cent thereof is the amount demanded by plaintiff of defendant, together with 10 per cent of said amount for failure to pay the same, and that defendant has not paid said amount, or any part thereof, or said additional sum of 10 per cent of said amount, or any part thereof.

Then the defendant (plaintiff in error herein) further answering, sets up two further defenses, in effect, as follows:

First. That said initiative act, to-wit: Chapter 1 of the Oregon Laws for 1907, is violative of Sections 2, 3, 4 and 8 of Article I, Sections 3 and 4 of Article IV, and Articles V and VI of the Constitution of the United States, and Article

XIV of amendments thereto, alleging that said sections of the federal constitution imply that the several states of the Union shall create and maintain representative legislative assemblies, and that the amendment to the Constitution of the State of Oregon, permitting direct legislation by the people and the said law enacted thereunder, destroys representative government and violates said sections in that respect; and that Section 4 of Article IV of the Constitution of the United States guarantees that each state shall maintain a republican form of government, and alleges that said initiative measure and said amendment to the Oregon Constitution under which it was enacted are inconsistent with and violative of a republican form of government, and, therefore, null and void.

Second. Defendant, plaintiff in error, alleges that it has paid taxes on all its property under the general revenue and taxation laws of the State of Oregon and under the corporation license tax law of the state, and, therefore, the act imposing the tax under which this action is brought is null and void, being in effect double taxation, and that it contravenes the equal and uniform principle of the Oregon Constitution relative to assessment and taxation.

A third defense was also set forth in said answer, to the effect that said initiative act imposing the tax in question was void for the reason that it undertakes to tax the business done by defendant as a telegraph company with the offi-

cials of the government of the United States, under and pursuant to the provisions of an Act of Congress, approved July 24, 1866, but on motion of defendant, plaintiff in error herein, that defense was stricken from the answer, the same being paragraphs 24, 25, 26 and 27 thereof, set forth on pages 14 and 15 of the record herein, and hence was not considered in the state courts, and the same is not involved in this appeal. (Transcript of Record, pages 3 to 16, inclusive).

Defendant in error (plaintiff in the state court) filed a demurrer to the further answer of defendant, as a whole, for the reason that the new matter set forth therein does not constitute a defense to the cause of action set forth in the complaint, nor to any part thereof, and, separately, to counts numbered 1 to 23, both inclusive, and 24 to 29, both inclusive, and to each paragraph of said answer separately, for the same reason. (Transcript of Record, page 23).

Said demurrer was sustained by the State Supreme Court on the 9th day of March, 1908, and judgment given in favor of the State of Oregon, from which judgment and decree of the Supreme Court of the State of Oregon, this writ of error was sued out, which judgment of the state court is found on pages 35, 36 and 37 of the record herein.

The amendment to Section 1 of Article IV of the Oregon Constitution is made a part of the answer, and is set forth on page 4 of the Transcript of Record.

The act making effective the provisions of said amendment was attached to and made a part of the answer, marked "Exhibit A," and is set forth in full on pages 17 to 22, both inclusive, of the Transcript of Record.

The initiative act imposing the tax involved in this cause, also set forth in the answer, is printed on pages 5, 6 and 7 of the Transcript of Record.

A copy of the official ballot used in the election of June 4, 1906, at which the initiative act was voted, is attached to the Transcript of Record herein, between pages 22 and 23, and was "Exhibit B" of said answer.

The writ of error to this court raises three questions:

First. Is the authority to determine whether a state government is republican in form, a political or a judicial power?

Second. Whether the initiative method of enacting laws, as adopted by the State of Oregon, contravenes any of the provisions of the federal constitution.

Third. Whether the tax imposed by said Chapter 1 of the Session Laws of Oregon for 1907 is violative of the equal and uniform principle of the Oregon Constitution relative to assessment and taxation.

We will discuss the propositions in the order named.

I.

The power to determine whether a State has a republican form of government is vested in Con-

gress. Hence, is a political rather than a judicial question.

Luther *v.* Borden *et al.*, 7 How. (U. S.) 1-42;
Texas *v.* White, 7 Wall. (U. S.) 700, 730;
Taylor *v.* Beckman, 178 U. S. 548, 578;
Hopkins *v.* City of Duluth, 81 Minn. 189 (83 N. W. 536);
Article by W. A. Coutts, Vol. VI, No. 4, p. 304, Michigan Law Review;
In *re* Duncan, 139 U. S. 449.

And if judicial the courts of the United States will follow the decision of the State courts, where the State court has passed upon the question.

Luther *v.* Borden, 48 U. S. 1-40;
Leeper *v.* State of Texas, 139 U. S. 462-467.

As far as we have been able to discover, the Federal authorities, including the Supreme Court, have treated this as a political question.

In Luther *v.* Borden *et al.*, 7 How. (U. S.) 1, 42, the court says:

"Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of govern-

ment, and shall protect each of them against invasion, and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

In Texas *v.* White, 7 Wall. (U. S.) 700, 730, the court say:

"But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress."

Then the court quotes with approval from Luther *v.* Borden, *supra*, as follows:

"Under the fourth article of the constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantees to each State a republican form of government, Congress must necessarily decide what government is established in the State, be-

fore it can determine *whether it is republican or not.*"

And in Taylor and Marshall *v.* Beckham, 178 U. S. 548, this court, upon this proposition, affirms the doctrine announced in Luther *v.* Borden and Texas *v.* White, *supra*, the court using the following language: (Page 578)

"It was long ago settled that the enforcement of this guarantee belonged to the political department. Luther *v.* Borden, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that as the Supreme Court of Rhode Island holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the Constitution and laws of the State."

The duties of the courts are in no sense legislative, and they have no authority to make laws, but are simply confined to their construction and enforcement. The Constitution is the fundamental law of the land and the rule by which the courts are to be guided in determining whether a law has been enacted in the manner the people have decreed shall be observed by the law-making powers. If the Supreme Court of a State attempts to

say whether the fundamental law of the State is a just law or whether it establishes the form of State government guaranteed by the Federal Constitution, it assumes a control over the making of constitutions—something that was never intended by such constitutions. The courts thus assume an authority not given in the fundamental laws and therefore not vested in them. The courts are purely creatures of the statutes and the constitutions, and derive all of their powers therefrom, and if we have a form of government which is unrepublican in character and, therefore, not such a form of government as is guaranteed by the Constitution of the United States and our Constitution, therefore, void and ineffective, then we have no courts capable of pronouncing any judgment whatever, because they are not created under any valid law. It cannot be claimed that the courts have the authority to provide any manner or take any steps towards the restoration of a subverted and overthrown State government. That authority is vested in the executive and legislative branches of the United States government, and if they have the power of restoration, the power also of deciding when a State government is subverted or overthrown, must rest in the same place.

In Vol. 6, Michigan Law Review, page 304, Mr. W. A. Coults, in an able article, entitled, *"Is a Provision for the Initiative and Referendum Inconsistent with the Constitution of the United*

States," upon the question under discussion, among other things, at pages 309 and 310, says:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guaranty to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts. So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guaranty. They might, if they had deemed it advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and, no doubt, wisely; and, by the Act of February 28, 1795, provided that, 'in case of an insurrection in any State against

the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection.'"

Also Mr. Cooley, in his work on Constitutional limitations, treats the question of whether a State Constitution is republican in form as political. He says, page 59, 7 Ed.; 42 6 Ed.:

"There are always in these cases questions of policy as well as of constitutional law to be determined by the Congress before admission becomes a matter of right,—whether the Constitution formed is republican; whether suitable and proper State boundaries have been fixed upon; whether the population is sufficient; whether the proper qualifications for the exercise of the elective franchise have been agreed to; whether any inveterate evil exists in the Territory which is now subject to control, but which might be perpetuated under a State government,—these and the like questions, in which the whole country is interested, cannot be finally solved by the people of the Territory for themselves, but the final decision must rest with Congress, and the judgment must be favorable before admission can be claimed or expected."

This question does not lose its political complexion because it has arisen since the admission of Oregon into the Union of States. If the courts take jurisdiction of these questions, then we have a decision upon a political question, decided by the

political power, re-examined by the judicial and perhaps overthrown. One branch of the government becomes arrayed against another, and revolution or rebellion is imminent. Oklahoma was admitted as a State with the power reserved to the people to initiate laws the same as reserved in the Oregon Constitution. Is this power to be permitted to one State and denied to another on high constitutional grounds, and under the same Federal guaranty that each State shall have the same kind of a government, the political power of the general government holding it to be republican in form, the judiciary that it is not. In a government where the final power rests with the people, if there is any doubt as to whether a matter should be determined by the political or the judicial branch, it should be resolved in favor of the political.

It is not a decision upon one clause of the Constitution, but the whole instrument is examined and considered, and the plan or scheme of government there outlined adjudged to be republican, or anti-republican, in character. That is as far as Congress attempts to go, and in the case at bar, the original instrument having been amended, the power to re-examine the same as to whether the republican form of the State government has been changed to a form anti-republican still remains vested in Congress, where it was lodged by the Federal Constitution. If not, we are unable to conceive by what authority Congress has been divested of that power. We freely admit that the

courts have the authority to say whether an amendment to the Constitution of a State has been enacted in the manner provided in the instrument for amending the same, but that is as far as the jurisdiction of the courts extend. As soon as they decide that the amendment has been properly enacted, it becomes a part of the Constitution, and if the amendment is of such a character that it changes the form of government, making it contravene the Federal Constitution, as to its political form, Congress has the power to so declare, and direct the State to make its Constitution conform to the form of government guaranteed by the Federal Constitution, and in such case will act whenever the matter is called to its attention, and if necessary, command all the forces of the general government, including the military, to enforce its decree.

We also call the attention of the court to the fact that the State of Oklahoma was recently admitted into the Union with the initiative and referendum principles reserved to the people. Sections 2 and 3 of Article 5 of the Oklahoma Constitution provide:

"Sec. 2. The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and 15 per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measuse so proposed. The second power is the referendum, and it may be ordered (except as to

laws necessary to the immediate preservation of the public peace, health, or safety) either by petition signed by 5 per centum of the legal voters or by the legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the whole number of votes cast at the last general election for the state office receiving the highest number of votes at such election.

"Sec. 3. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislature which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures voted on by the people. All elections on measures referred to people of the State shall be had at the next election held throughout the State, except when the legislature or the governor shall order a special election for the express purpose of making such reference. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast in such election. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.

"The style of bills shall be, 'Be it enacted by the people of the State of Oklahoma.'

"Petitions and orders for the initiative and the referendum shall be filed with the Secretary of State and addressed to the Governor of the State, who shall submit the same to the people. The legislature shall make suitable provisions for the carrying into effect the provisions of this article."

And the President's message declaring Oklahoma a State contains the following:

"Whereas, it appears the said Constitution and government of the proposed State of Oklahoma are republican in form, etc."

The case at bar being an attack on the fundamental law of the State and said law being the instrument which creates the court and defines its powers, can it be possible that the court has jurisdiction to pass upon the political complexion of the Constitution itself, unless it is so expressed in the instrument? There is no such thing as inherent power in the courts. They can exercise no jurisdiction or power except that which is derived from the Constitution creating the court, whether State or Federal. Section 4 of Article 4 of the United States Constitution guarantees to every State a republican form of government and therefore makes it the duty of the general government to determine when the State has such a form. It is conceded by all constitutional writers that when a new State applies for admission, Congress is the department to determine whether the proposed State Constitution is in the required form and if not, it is rejected and must be changed to meet the requirements of Congress. No provision is made, nor has it ever been claimed that the Supreme Court of the United States should decide the question or that it has power so to do. Cooley, before cited, says, p. 243:

"If in one department was vested the whole power of the government, it might be essential

for the people in the instrument delegating this complete authority to make careful and particular exception of all those cases which it was intended to exclude from its cognizance, for without such exception the government might do whatever the people themselves, when met in their sovereign capacity would have power to do. But when only the legislative power is delegated to one department and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws. The assumption of judicial power by the legislature in such a case is unconstitutional, because although not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise. And for similar reasons a legislative act which should undertake to make a judge the arbiter of his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government."

Plaintiff in error cited in the State court the homestead cases, 22 Gratt. 266, involving the validity of a provision of the Constitution of Virginia, adopted in 1866, exempting homesteads from execution and levy for antecedent debts, in support of the contention that the courts have jurisdiction in the case at bar.

These cases were in no sense political. They did not involve the question as to whether the form of the Virginia government was republican,

but only a principle of property rights, and the court held that Section 1 of Article XI of the Constitution of Virginia, exempting homesteads to the amount of $2,000 was violative of Section 10of Article VIII of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts, and the court held the Constitution of that State could not exempt homesteads to the amount of $2,000, or in any other amount, when the exemption would enable a debtor to avoid a debt contracted prior to the adoption of the homestead law, and to that extent the said law would be hostile to the Federal Constitution; and held also that the court had jurisdiction to try that question. The jurisdiction vested in a court to determine whether a constitution denies some personal or property right guaranteed in the Federal Constitution does not imply that the court can decide whether the State government is in form republican, monarchical or aristocratic.

It has, also, been held in this court that a State could not pass *expost facto* laws. (Kring *v.* Missouri, 107 U. S. 221). But we have been unable to find a case where the court has taken cognizance of purely political questions, like the one involved in this case, and undertaken to decide whether a State government is republican or anti-republican in form.

"Each State must judge for itself how the powers of government shall be apportioned in order to their proper exercise; what protection shall be

thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good, and the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subject it covers, the fundamental rule of action throughout the whole United States." Cooley, Const. Lim., 6 Ed., page 45.

While a court may decide whether an amendment of a constitution has been adopted in the prescribed manner, and whether it denies any constitutional right, either as to property or person, it would, we submit, be considered an invasion of the prerogatives of Congress should the court undertake to decide whether the constitution of a new State seeking admission is republican in form, and to decide whether it should become a member of the Union.

II.

If the court decides to retain jurisdiction, the principal question is whether the initiative and referendum amendment to Section 1 of Article IV of the Constitution of the State of Oregon contravenes the provisions of Section 4 of Article IV of the Constitution of the United States, or any other section or provision thereof, as being unrepubli-

can in form or in any other manner, and the main contention of plaintiff in error in the State court was that said amendment is void for the reason that the Constitution of the United States guarantees to every State a republican form of government, and that such a form of government is wholly representative in character, and all legislation must be enacted by legislators elected or chosen by the people; hence, said amendment to the Oregon Constitution, permitting the people of the State to initiate and enact a State law or regulation (except through the medium of the State legislature) and all laws enacted by virtue thereof under initiative methods are void, and, therefore, the law imposing the tax in question, being so enacted, cannot stand.

This question is fundamental in character, affecting the authority of the State to enact its laws and regulate its internal affairs; in any manner agreeable to its citizens, and should not be decided by technical rules, but should be approached and disposed of on broad grounds and liberal views.

A State Constitution should not be held to contravene the Federal Constitution unless the general scope and plan of government provided in the former is opposed to the general scope and plan of government required by the latter, to be maintained by the State.

The argument of the plaintiff in error in the State court appeared to be based on the theory that changing the State Constitution so as to

permit of direct legislation is changing the form of government from a "republican form"; hence a State Constitution, permitting such method of legislation, conflicts with the Federal Constitution, and cannot stand. Therefore, it is necessary first to determine what, in the meaning of the term as used in the Federal Constitution constitutes a

REPUBLICAN FORM OF GOVERNMENT:

Section 4 of Article IV of the Federal Constitution, claimed to be violated by the people of Oregon by the adoption of the amendment to Section 1 of Article IV of their Constitution June 2, 1902, reads as follows:

"Section 4. The United States shall guarantee to every State in the Union a republican form of government and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

And the said amendment to the Constitution of the State of Oregon claimed to be repugnant thereto is in the following language:

"Section 1 of Article IV of the Constitution of the State of Oregon shall be, and hereby is, amended to read as follows:

"Section 1. The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitu-

tion and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme

Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

The amendment does not attempt to do away with the legislative assembly, but leaves it intact with full power to enact or repeal any and all laws and perform every obligation imposed upon it by the Federal Constitution and laws. It merely reserves the right to propose laws and to enact or reject the same at the polls, independent of the legislative assembly, including amendments to the Constitution. We are unable to understand wherein the reservation of that power and the power to demand that any act passed by the legislature not necessary for the immediate preservation of the public peace, health or safety be referred to the people for their approval or rejection, is unrepublican in character or contravenes any provision of the Federal Constitution.

We submit it is essentially republican in form as guaranteed in the Federal Constitution, construed in the light of the following authorities:

Cooley, Const. Lim. (7 Ed.) 59, 6 Ed. 42 and 45;

Federalist, Hamilton Ed., Paper 39, p. 301;

Federalist, Hamilton Ed., Paper 43, p. 342.
Oberholtzer on the Referendum in America, Chap. 45, pp. 368 and 369;
2 Vol. Story, Const. (5 Ed.) Secs. 1815 to 1819, both inclusive;
Elliott's Debates, Vol. 1, p. 406;
Elliott's Debates, Vol. 5, p. 160;
Vol. XV Writings of Thomas Jefferson, p. 17 (See Vol. XI, Federal Ed., p. 529);
Chisholm *v.* Georgia, 2 Dallas (U. S.) 419, 457;
In *re* Duncan, 139 U. S. 449, 461;
Luther *v.* Borden, 7 How. (U. S.) 42;
Minor *v.* Happersett, 21 Wall. (U. S.) 162, 175;
Taylor v. Beckham, 178 U. S. 548, 478; 20 Sup. Court Rep. (U. S.) 890, 901;
Hopkins *v.* Duluth, 81 Minn. 189; 83 N. W. 536;
People *ex rel. v.* Sours, 31 Colo. 369, 383;
In *re* Andrew Pfahler, 150 Cal. 71, 77, 78;
Ex parte Wagner, 21 Okl. 33, 36;
Kadderly *v.* Portland, 44 Or. 118, 144; 74 Pac. 710;
Oregon *v.* Pac. States T. & T. Co., 53 Or. 162; 99 Pac. 427;
Straw *v.* Harris, 54 Or. 424, 431;
Kring *v.* Missouri, 107 U. S. 221.

The members of the Federal convention considered a "republican form of government" to be

a government which derived all its powers from the great body of the people, and this view is also maintained by many other eminent statesmen.

Mr. James Madison, a member of the constitutional convention, in The Federalist (Hamilton Ed.), Paper No. 39, page 301, says:

"What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different states, no satisfactory one would ever be found."

Mr. Madison evidently considered the essential part of a republican form of government to be a government in which all the sovereign powers rest in the great body of the people, regardless of the manner in which those powers are exercised by the people, whether directly or by representatives or other agencies.

In Paper 43, at page 342, same book, the same writer, in discussing the guaranty to every State in the Union of a republican form of government, says:

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say, what experiments may be produced by

the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. *The only restriction imposed upon them is, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.*"

It is evident from the above excerpts that the writer understood the word "republican," as used in Section 4 of Article IV of the Federal Constitution, to mean and refer to popular government.

In the case of Chisholm *v.* Georgia, 2 Dallas (U. S.) 419, 457, Mr. Justice Wilson, who was one of the delegates from Pennsylvania to the Constitutional Convention, said:

"As a citizen, I know the government of that State (Ga.) to be republican, *and my short definition of such a government is one constructed on this principle; that the supreme power resides in the body of the people.*"

This opinion was announced in 1793, only a few years after the adoption of the Federal Constitution, and may be considered as a contemporaneous definition of the phrase "Republican form of government."

At the time the Federal Constitution was made, and when the above case was decided, the Constitution of Georgia contained the following reservation of the initiative power to amend the State Constitution:

"Article LXIII. No alteration shall be made in this Constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State, at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid."

Also, in the Federal convention, Mr. Wilson said:

"He wished for vigor in the government, but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The government ought to possess, not only, first, the *force*, but, second, the *mind* or *sense*, of the people at large. The legislature ought to be most exact transcript of the whole society. *Representation is made necessary only because it is impossible for the people to act collectively.*" Vol. 5 Elliott's Debates, p. 160.

It thus appears that his understanding was that representation was not necessary to a republican

form of government, but necessary *"only because it is impossible for the people to act collectively."*

John Randolph, also a member of the convention, used the word "republican," as opposed to monarchy or monarchical form of government.

He was for the present amendment (the same being the final draft) "because a republican government must be the basis of our national union; and no State in it ought to have it in their power to change its government into a monarchy. 1 Elliott's Debates, 406.

The framers of the Federal Constitution knew that in at least four of the confederated States, to-wit: Massachusetts, Connecticut, New Hampshire, and Rhode Island, there was a system of local governments known distinctively as "New England Towns." That they were on an average six miles square, and the people residing in those limits were organized by law into bodies politic and were clothed with power to legislate upon various matters within their boundaries, such as roads and highways, support of the poor, election of their own officers, etc., and that the inhabitants assembled at least once a year to pass their local laws and regulations, and yet the members of the Federal convention apparently did not consider these local governments, no matter how vigorous and flourishing, as unrepublican in form or inimical to republican institutions.

Mr. Thomas Jefferson, in his letter to Mr. John Taylor, of date May 28, 1816, in Vol. XV, Jefferson's Writings (Library Edition), at page

19, defines the term "republic" as follows: (Federal Ed. 529)

"Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens. Such a government is evidently restrained to very narrow limits of space and population. I doubt if it would be practicable beyond the extent of a New England township. The first shade from this pure element, which, like that of pure vital air, cannot sustain life of itself, would be where the powers of the government, being divided, should be exercised each by representatives chosen either *pro hac vice*, or for such short terms as should render secure the duty of expressing the will of their constituents. This I should consider as the nearest approach to a pure republic, which is practicable on a large scale of country or population * * * On this view of the import of the term *republic*, instead of saying, as has been said, 'that it may mean anything or nothing,' we may say with truth and meaning, that governments are more or less republican, as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of the citizens is the safest depository of their own rights and, especially, that the evils flowing from the duperies of the people, are less injurious than those from the egoism of their agents, I am a friend to the composition of government which has in it the most of this ingredient."

Story on the Constitution, 2 Vol., 5th Ed., Chapter XLI, discusses the guaranty of republican government, apparently in full harmony with the definition of republic for which we contend, and he refers to the Federalist in Sec. 1815 of said chapter, saying:

"The Federalist has spoken with so much force and propriety upon this subject, that it supersedes all further reasoning. 'In a confederacy,' says that work, 'founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained."

The Oregon method of invoking the initiative in legislation is a method of avoiding the difficulty, the framers of the Federal Constitution urged as the main objection to the people legislating directly, as voiced by Mr. Wilson, *supra*:

"Representation is made necessary only because it is impossible for the people to act collectively."

The laws under consideration provide a way for the people to act collectively and at the same time with knowledge. Each voter must be furnished with the full text of each law at least six weeks prior to the election at which he is required to vote upon the same. The people do not meet

en masse nor vote *viva voce*, but alone in single booths, and under the solemn sanction of the Australian ballot. This also avoids the danger of a law being enacted through the sudden heat of passion or prejudice, engendered at the time of meeting by the persuasive eloquence of some great orator. In fact, it leaves all of the ancient objections to popular government with absolutely no support in sound reason. As we have seen, it acts as a check upon vicious legislation by the legislative assembly, and at the same time provides a means, whereby good measures denied by the legislature can be carried into effect, and the will of the people respected and made effective, in practice as well as in theory. The rights of no man, whether pertaining to person or property, are jeopardized by the Oregon system, nor is any constitutional safeguard imperiled or destroyed.

Both the Federal and State courts have uniformly held that the initiative method of enacting laws was not repugnant to the provisions of Section 4 of Article IV of the Federal Constitution, either directly or by necessary inference.

Chrisholm *v.* Georgia, 2 Dallas (U. S.) 419, 457;

In *re* Duncan, 139 U. S. 449, 461;

Minor *v.* Happersett, 21 Wall. (U. S.) 162, 175;

Hopkins *v.* City of Duluth, 81 Minn. 189; 83 N. W. 536;

People *ex rel. v.* Sours, 31 Colo. 369, 383, 386; 37 Pac. Rep. 167, 168, 172;

In *re* Andrew Pfahler, 150 Cal. 71, 77-78;
Kadderly *v.* Portland, 44 Or. 118; 74 Pac. 710;
Oregon *v.* Pac. States T. & T. Co., 53 Or. 162; 99 Pac. 427;
Straw *v.* Harris, 54 Or. 424, 431.

The case of Chisholm *v.* Georgia, before cited, 2 Dallas (U. S.) 419, at page 457, is the first judicial definition of republican government we have been able to find. In that case, Mr. Justice Wilson, who, as we have before stated, was a member of the Federal convention, and to whom Mr. Justice Harlan has referred as the most learned member thereof, in discussing the question of whether a state may be sued in the Supreme Court by an individual citizen of another State, or whether the State on account of being a sovereign power, could not be so sued, said:

"In another sense, according to some writers, (a) every State, which governs itself, without any dependence on another power, is a sovereign State. Whether, with regard to her own citizens, this is the case of the State of Georgia; whether those citizens have done, as the individuals of England are said, by their late instructors to have done, surrendered the supreme power to the State government, and reserved nothing to themselves; or whether, like the people of other States, and of the United States, the citizens of Georgia have reserved the supreme power in their own hands; and on that supreme power, have made the State dependent, instead of being sovereign; these are questions to which, as a judge in

this case, I can neither know nor suggest the proper answers; though, as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know the government of that State to be republican; and my short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people."

In Minor *v.* Happersett, 21 Wall. 162, at pages 175, 176, the court having under consideration the question whether a provision in the Constitution of the State of Missouri, which confined the right of voting to male citizens of the United States, was violative of the fourteenth amendment of the Federal Constitution, said:

"It is true that the United States guarantees to every State a republican form of government. It is also true that no State can pass a bill of attainder, and that no person can be deprived of life, liberty, or property without due process of law. All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

"The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

"The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments

when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." Opinion by Chief Justice Waite.

A part of the "unmistakable evidence" the court had before it, when that decision was made, must have been knowledge of the New England system of local governments, hereinbefore mentioned.

In Hopkins *v.* City of Duluth, 81 Minn. 189 (83 N. W. 536), the court, having under consideration the question whether an amendment to the State Constitution providing for the submission of new city charters or amendments thereto to the voters of the localities interested for approval or rejection, violated Section 4 of Article IV of the Federal Constitution, at pages 191 and 192, says:

"The purpose of this guaranty was to protect a union founded upon republican principles against aristocratic and monarchical innovations. Cooley, Const. Lim., 28. At the close of the Civil War this guaranty was made the subject of much discussion in Congress, partaking of a political character, in the efforts towards reconstruction. It is a Federal guaranty, to be exercised by Federal, rather than State, authority. The con-

ditions and necessities of its exercise are as yet quite abstract and theoretical, and it is not easy to see how its application here is of any particular consequence. It will be admitted, however, that this State cannot supplant its republican form of government by "aristocratic and monarchical innovations" upon principles inherent in the nature of the government, but it may change its Constitution in any way consistent with its own fundamental law; and we are unable to see the force of the suggestion that the amendment of 1898 is not republican in form as well as spirit. It is true that, by the submission of charters and amendments to municipalities in the manner provided for by the amendment, a change is effected; but it is a change that by every historical sanction, from the earliest times, is republican in form and essence. The Federal as well as the State government is representative in character, although the people do not directly vote upon the adoption of the laws by which they are governed. Yet it cannot be said that, if they were able to do so, a provision to effectuate that purpose would not be republican. We apprehend that a little reflection must satisfy any one that the advantage of providing local self government by the voters directly interested, through a 'referendum' is abstractly as well as concretely more republican than through representatives of the people in the legislature, many of whom are not at all interested in the affairs of the given locality."

"The suggestion that the constitutional amendment authorizes a submission of a charter and amendments thereto through the instrumentalities of a commission has no weight, so long as the final adoption depends upon the exercise of the

elective franchise. The test of republican or democratic government is the will of the people, expressed in majorities, under the proper forms of law. Every proposal for a change of government must of necessity be submitted, either directly or indirectly, through a designated origin, whether it be upon the motion of one or of more persons, upon the instance of the individual citizen or a number; but so long as the ultimatum of decision is left to the will of the people at the ballot box, it is essentially republican, and the theoretical distinction urged by the learned counsel for the contestee practically amounts to no more than this, that the change provided for is new and radical. It may turn out that the amendment is beneficial or otherwise, yet its tendency is clearly republican, and must be upheld by the court."

In People *v.* Sours, 31 Colo. 369, 384, and 385, the court holds that an amendment, consolidating a city and county government into one, and providing that the people of the city and county shall adopt a charter and to adopt any measure for their government, not inimical to the said amendment, is not obnoxious to the provisions of the enabling act, which requires the Constitution to be republican in form, and not repugnant to the Constitution of the United States.

In Kadderly *v.* Portland, 44 Or. 118, at page 146, the court says:

"The veto power of the Governor is not abridged in any way, except as to such laws as the legislature may refer to the people. The provision of the amendment that 'the veto power of the Governor shall not extend to measures re-

ferred to the people' must necessarily be confined to the measures which the legislature may refer, and cannot apply to acts upon which the referendum may be invoked by petition. The Governor is required, under the Constitution, to exercise his veto power, if at all, within five days after the act shall have been presented to him, unless the general adjournment of the legislature shall prevent its return within that time, in which case he shall exercise his right within five days after the adjournment. He must necessarily act, therefore, before the time expires within which a referendum by petition on any act of the legislature may be invoked and before it can be known whether it will be invoked or not. Unless, therefore, he has a right to veto any act submitted to him, except such as the legislature may specially refer to the people, one of the safeguards against hasty or ill-advised legislation which is every where regarded as essential is removed—a result manifestly not contemplated by the amendment."

And in the case at bar the State court cited with approval the opinion in Kadderly *v.* Portland, saying:

"Whether the initiative and referendum amendment to the Constitution is invalid, because repugnant to the provisions of the Constitution of the United States, was thoroughly argued to and considered by this court in Kadderly *v.* Portland, 44 Or. 118 (74 Pac. 710; 75 Pac. 222), and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to re-state them at this time." Oregon *v.* Pacific States T. & T. Co., 53 Or. 162, 166.

The latest expression of the Oregon Supreme Court is found in Straw *v.* Harris, 54 Or. 424, 431, in which Mr. Justice King, delivering the opinion of the court, says:

"By the adoption of the initiative and referendum into our Constitution, the legislative department of the State is divided into two separate and distinct lawmaking bodies. There remains, however, as formerly, but one legislative department of the State. It operates, it is true, differently than before—one method by the enactment of laws directly, through that source of all legislative power, the people; and the other, as formerly, by their representatives — but the change thus wrought neither gives to nor takes from the legislative assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. Nor do we understand that it was ever intended that it should do so. The powers thus reserved to the people merely took from the legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them. This dual system of making and unmaking laws has become the settled policy of the State, and so recognized by decisions upon the subject. Kadderly *v.* Portland, 44 Or. 118 (74 Pac. 710; 75 Pac. 222); Oregon *v.* Pac. Sta. T. & T. Co., 53 Or. 162 (99 Pac. 427)."

And the United States Supreme Court, in *re* Duncan, 139 U. S., at page 461, says:

"By the Constitution, a republican form of government is guaranteed to every State in the Union, *and the distinguishing feature of that form is the right of the people to choose their own*

officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

The foregoing definitions by some of the ablest statesmen who participated in revolutionary events, and the decisions of the Federal and State courts as far as we have been able to find expression upon the question, substantially agreeing that the essentials of a republic form of government are that it derives all of its powers either directly or indirectly from the people, and that *representation* is not necessary to constitute such government, should be considered as establishing the meaning of the phrase as used in Section 4 of Article IV of the Constitution of the United States.

We are unable to find a single expression of any member of that memorable convention, or of a court, holding the view that legislation by representatives only is an essential of a republican *form of government*, and submit that unanimity of opinion for more than a hundred years should be decisive.

The stability of government demands that the universally understood meaning of a fundamental law shall not be lightly set aside.

Also, the executive and legislative branches of the Federal government have held, in substance, that the reservation of the initiative and referendum powers by the people of a State is not violative of the Federal Constitution nor hostile to a republican form of government. Senators and representatives from States reserving those powers are seated in the Senate and House of Representatives without protest. When new States are admitted, the President and Congress pass upon the form of government presented by the proposed State, and decide whether the same is in harmony with the Constitution of the United States, and they have in several cases approved State Constitutions reserving the identical powers attacked in the case at bar, notably: Oklahoma and Arizona, and other States have changed their Constitutions to include those powers, to-wit: South Dakota, Utah, Colorado, Arkansas, Maine and Oregon, without objection from any Federal authority, and no question has ever been raised as to their representation in Congress.

Also the right of the people to instruct their representatives in Congress and in State legislatures, if it exists, is an admission or acknowledgment that the supreme power rests in the people, and we contend that such right does exist.

RIGHT TO INSTRUCT.

The right of the people to instruct their representatives in Congress and in State legislatures is preserved by the ninth and tenth amendments to the Constitution. Therefore, the representative system of government, which defendant admits is republican in form, *includes a final power in the people.* Said Articles IX and X read as follows:

"IX. *Rights Retained.* The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

"X. *Powers Reserved.* The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 26, Article I, Oregon Constitution, expressly recognizes the right of instruction, said section providing among other things as follows:

"No law shall be passed restraining any of the inhabitants of the State * * * from instructing their representatives," etc.

And Section 33 of Article I of the Oregon Constitution provides this enumeration of rights and privileges shall not be construed to impair or deny others retained by the people. This right to instruct has been frequently exercised from the formation of the government, and is recognized in the Constitutions of many of the States, including Maine, New Hampshire, Vermont, Massachusetts, Tennessee, Ohio, Indiana, Illinois, Michigan,

Arkansas, California, and Oregon, but whether it exists in States where not recognized in their Constitutions, seems to be a mooted question.

Cushing's Law and Practice of Legislative Assemblies has the following on the question of the right of instruction, Section 727:

"In this country, the right of instruction has been contended for on the one hand, independent of constitutional provision, and, on the other, has been denied to exist, even where it is expressly conferred, in any other sense, than as declaring the right of constituents to make known their views and wishes to their representatives. Both propositions are equally untenable. A right of instruction, to which the duty of obedience is not correlative, is entirely inconsistent with the Constitution and functions of an independent, sovereign legislative power; and it is equally impossible to suppose that the right of instruction is restricted, in those of the Constitutions in which it is declared, to signify a mere expression of opinion on the part of constituents, with which representatives are at liberty to comply or not at their pleasure. It may be stated, therefore, in regard to the right of instruction in this country, that it exists only in those States in which it is expressly reserved by constitutional provision; and that where it so exists, it is an absolute right, to be implicitly obeyed, when exercised, so far as it is authoritatively expressed."

Oregon having recognized and reserved this right to instruct, can exercise the same at will and can finally determine by what law she shall be governed, provided always that her laws and

Constitution do not contravene the Federal Constitution and laws of Congress. This right to instruct being reserved in the Constitution of the United States was not granted by the States to the Federal government, hence must be considered as a part of the rights reserved, carrying with it the admission that the form of government established by the colonies was such as to include and did include the principle that the final power rests with the people, and such was at the adoption of the said Constitution considered by the framers of that instrument to be republican in form.

Sovereignty is defined, Rapalje and Lawrence's Law Dictionary, as: "That power in a State to which none other is superior."

In Moore *v.* Emaw and Freemont *v.* Flower, 17 Cal. 199, sovereignty is defined, as a term used to express the supreme political authority of an independent State or Nation.

From the standpoint of sovereignty as above defined, the location of the different systems of government are classified as follows: Monarchical, Aristocratic, and Republican, and we submit it was in this sense that the Federal Constitution used the term republican. This is gathered from the Federalist, Elliot's Debates on the Adoption of the Constitution, and commentaries on this clause.

Federalist Letter, 43.

The methods by which the people's power is used in popular systems of government may be

classified as direct, representative, and mixed, a combination of the other two, which was the system in operation in this country in 1787; and it follows that this mixed form is a republican system of government, and that "republican form of government" and representative government are not synonymous terms. Each is part of a distinct and separate system of classification, and while from the standpoint of sovereignty all popular governments may be called republican, it was the mixed form of direct and representative, which was established by our revolutionary fathers and still exists. If the final power rests with the people, they can exercise that power in any form they deem best for themselves, provided the form is not anti-republican.

The classification of the different systems just mentioned may be illustrated as follows:

Forms of government from standpoint of sovereignty—
- Monarchial,
- Aristocratic,
- Republican.

Forms of popular (republican) government, from standpoint of use of people's power—
- Direct,
- Representative,
- Mixed (combination of the direct and representative).

It will be conceded, we doubt not, that in establishing a government, the will of the people is supreme. It is sovereign, and they may reserve

such powers to themselves and invest the government they establish with such powers and confer them upon such agents as they believe will be the most conducive to their own welfare, and all such powers must be exercised in the manner provided in the Constitution, but this does not prohibit the people from amending their Constitution, in the manner therein provided, and in the case at bar, the people amended their Constitution in accordance with the methods provided, and then legislated in pursuance of the amendment. Therefore, the doctrine that in a representative government the legislature cannot delegate to the people the power to make laws, does not apply. The only question is, does the amendment of the Oregon Constitution permitting of the initiative method of legislation contravene any provision, or provisions, of the Federal Constitution?

Appellant in error contends that "history does not furnish the definition of the phrase 'republican form of government,' as those words were used by the framers of the Constitution. *They distinguished the American from all other republics by the introduction of the principle of representation.*" If the principle of representation was engrafted on a republican system, for convenience, as claimed by appellant in error, it does not follow that the representative system is the only republican form of government. The introduction of the representative principle was the departure, and created what is designated as a "rep-

resentative republic." And it is laid down by numerous authorities that any republican form may be substituted for the form existing when the Constitution was adopted, and the guaranty of the Federal Constitution could be invoked in its support. The court says in Hopkins *v.* City of Duluth, 81 Minn. 189:

"The Federal, as well as the State, government is representative in character, and the people do not directly vote upon the adoption of the laws by which they are governed. *Yet it cannot be said that if they were able to do so, a provision to effectuate that purpose would not be republican.*" (Italics ours).

Mr. Madison's definition of a republican form of government is fully met and exemplified in the case at bar. He says, Federalist, 302, before cited, that a republican form of government is:

"A government which derives all of its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."

In the case at bar all the powers of the State government are derived from the great body of the people and most of them directly, and the government is administered by persons holding office for a limited period.

Rapalje & Lawrence's Law Dictionary defines "republic" as: "A commonwealth; a form of government, the administration of which is open to all the citizens," and defines "republican government" as: "A government of and by the

people as distinguished from a monarchical or aristocratic government."

The Twentieth Century Encyclopaedia and Dictionary defines "republic": "A constitution in which the supreme power in the State is vested not in hereditary rulers, but in the citizens themselves according to the constitution of the nation; a republic may therefore vary from the proudest aristocracy to the most absolute democracy."

Encyclopaedia Americano (edition 1903-1904) defines "republic": "A word signifying a state in which the people are the source of power."

The contention of appellant in error, urged in the State court, that the powers of the initiative and referendum, reserved to the people, prevents the State from discharging the obligations imposed upon it, by the Federal Constitution and laws, is not well founded.

The two powers may be said to be inseparable, as the initiative sets in motion the power to enact a law, which must be referred to the people to approve or reject, and even when the people wish to demand that an act passed by the legislative assembly be referred to them for approval or rejection, they must first invoke the initiative, to-wit: must petition to have the act referred, but the petition has the force of a command and the officer to whom it is addressed has no discretion, but must obey.

Oberholtzer on the Referendum in America, in Chapter 45, discusses the relative relation of the two powers to each other. He says, on page 368:

"The initiative and the referendum, the initiative being mentioned logically first, have been introduced as inseparable parts of a whole into the legislative practice of South Dakota, Nebraska, California, Iowa, and the city of San Francisco, and they exist together in fact, if not in name, in nearly all the States of the Union."

And, again, on page 369:

"The referendum has been described as a condition precedent to the taking effect of a law; the initiative is a condition precedent to the referendum. The referendum, itself in the nature of a contingency, is made to depend upon a contingency, and that is the filing with representative local officials of a petition signed by a definite number of persons, asking that the citizens residing within a given district shall have the opportunity to say yea or nay on the proposition that it shall be governed by the terms of a certain local by-law which the State legislature has proposed."

Mr. Justice Bean says, in the Kadderly case, 44 Or. 145:

"Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people.

"8. Under this amendment, it is true, the

people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will."

The legislative assembly of Oregon, prior to said amendment to the Constitution of said State, could not pass a law which would authorize the election of United States Senator or Representative in any other manner than that provided by the Constitution of the United States, and the laws of Congress enacted relative thereto, and this amendment does not attempt so to do. It provides another mode for the people of Oregon to enact desired laws, but it does not in any particular presume to ignore any constitutional restrictions, either Federal or State, nor to disregard any law of Congress.

The allegation of legal conclusions in the bill of complaint (we are unable to view them in any other light) contained in paragraphs VIII to XXIII, both inclusive, are all based upon the assumed effect of said amendment to the Oregon Constitution, upon the ability of the State to discharge its obligations to the Federal government. Appellant in error assumes that it is impossible for the legislative assembly to enact the necessary laws for such purpose. But nothing of that

nature is expressed in the amendment nor must it be necessarily, or can it be logically inferred therefrom. It does not prohibit a legislative assembly nor deprive it of any of its powers. Therefore, the State can create and maintain representative legislative assemblies and the position that only a part of the voters of the State actually cast an affirmative vote upon laws and measures adopted by the people without the aid of the legislative assembly is equally void of merit. The people's representatives when assembler as lawmakers never, or very seldom, all agree upon any measure, and if a majority of each house is secured, the bill has received the solemn sanction of the legislature, and becomes a law when signed by the Governor. But it is urged by appellant in error that a majority of all the voters of the State do not always vote for the measure, but it becomes a law if a majority of all voting on the proposition are in favor. This, we admit, and contend, is strictly in accord with our form of government, State and Federal. In the election of members of the State legislature, it is seldom that a candidate receives a majority of all the votes of the State or of all votes cast, as there are usually more than two parties, each having a candidate, and a plurality must and does settle the question of the election, and in the legislative assembly a majority of plurality-elected members decides. But a majority of all votes cast for or against a measure always decides its adoption or rejection. There can only

be the two questions before the voters, *adopt or reject;* hence a majority of all votes cast on the proposition is secured. However, we contend that if the voters of the State so desire, they have the right to so amend their Constitution that the highest number of votes shall always be decisive, and it would not be unrepublican.

The legislative assembly is shorn of no power whatever, and we do not think it will be seriously so contended.

Mr. Justice Bean says, in the Kadderly case, *supra*:

"The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government, or substituted another in its place. The government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people."

Mr. Justice King, in Straw *v.* Harris, 54 Or., *supra*, holds that by the adoption of the initiative and referendum into the Oregon Constitution, the legislative department of the State is divided into two separate and distinct law-making bodies, but that there remains as formerly, but *one legislative department of the State.* That department, however, may operate by either of two methods, through the people by direct vote, or through the people by their representatives.

Oregon does not require different qualifications for the electors for the State legislature, and the

National House of Representatives, and her legislature still elects United States Senators. The acquisition by the National government of sites for forts, arsenals, etc., may still be made by purchase from the State with the consent of the legislature, and presidential electors are appointed in the manner prescribed by the legislature, nor is there any abridgment of any of the powers of the State legislature, to consent to and act with the general government in matters provided in the Federal Constitution and laws. When the Oregon legislature referred the initiative amendment to the people for adoption or rejection, it presumably had in mind all the provisions of the Federal Constitution, and, in our opinion, none of them are contravened by the amendment.

Inexpediency should not be considered. That is for the law-making power of the State.

Appellant in error urges the inexpediency of legislation by direct vote, as adopted by Oregon, although the people do not assemble *en masse*, but vote at the regular voting places and in the regular booths provided for that purpose.

The court has nothing whatever to do with the question of expediency except as it may tend to elucidate the law under consideration. The only proposition is, does the Oregon plan or scheme of government, as outlined in its Constitution, contravene the system of State governments guaranteed by the Federal Constitution. Whether the Oregon system is inexpedient or impractical or expensive, and like matters, are solely for the

law-making power of the State. The courts have no authority to declare a statute unconstitutional for the reason that it is not expedient or that it is impractical, or for the reason that the country is too large and the people too numerous. (Straw *v.* Harris, 54 Or. 424, 433). The court, in the case at bar, can only say whether the Oregon Constitution conflicts with the Federal Constitution or laws in any respect. The appellant says we have a "representative republic," and that such a republic was the particular system of government guaranteed to each of the States. But the Federal Constitution does not so read. The guaranty is for a republican form of government, and any form or scheme of government, republican in character, comes within the purview of the guaranty.

IMPROVED CONDITIONS SINCE ADOPTION OF FEDERAL CONSTITUTION.

The means of communication have improved since the time of Paul Revere's ride. Instead of a paper once a month, every farmer and mechanic has his daily paper delivered by the rural route system. His evenings are spent studying the politics of the Nation. The papers convey to the voter the daily changing political news, the business of the country, its relation with foreign commerce, the amount and quality of state and interstate commerce, in fact, everything of importance that transpires within the State, the Nation, and the world. In 1787, this was impos-

sible. The average farmer of today is as well informed generally as was the average member of the State legislature at the date of the adoption of the Federal Constitution. Also, the means of voting have been placed at almost every man's door. Instead of being obliged to travel dozens of miles and spend several days to vote, very few electors need to use more than half a day, and the larger number but a few minutes.

No one can question that most, if not all, of the objections urged against the initiative method of legislation on account of expediency, etc., have been removed by the progress of the people in education, traveling facilities, and all that goes to make up an intelligent, progressive community.

Even if this court would consider the questions of impracticability, inexpediency, etc., they cannot be urged at the present time with the same force, nor given the same weight as when the Federal Constitution was being prepared. American experience demonstrates that the people can directly, effectively and wisely adopt or reject proposed laws under modern conditions.

ARGUMENT BY C. E. S. WOOD, OF THE PORTLAND, OREGON BAR.

The Attorney General of the State of Oregon has done me the honor to request that I put into writing as an addendum to his brief the substance of my remarks made to him in casual conversation. I am very glad to do this, and appreciate the compliment of such a request; yet I have a certain hesitancy, upon two grounds: First, the point at issue in this appeal is so clearly a political question and so purely a matter of the internal arrangement of the State's political machinery that I am absolutely convinced that the Supreme Court of the United States will never get beyond this point and will dispose of it quite summarily. Second, I bear in mind the traditional reminder that the Supreme Court of the United States is presumed to know some law; and equally it seems to me it is presumed to know those great essential principles which underlay the formation of the Constitution of the United States and which are the A, B, C of our constitutional history. All the speeches, all the pamphlets, all the debates, every form of expression of the revolutionary period show that the words "republican form of government" were used in the widest possible sense, and invariably meant in the mouths of Washington, Hamilton, Jefferson, Madison, Franklin, only a "government of and by the people" as distinguished from tyranny, anarchy, despotism, monarchism, or government

by hereditary specially privileged class. It is true, Hamilton and Madison, in particular instances, arguing for our wide domain, and the wide reach required of the future government, spoke of the disadvantages of the pure democracies, such as the Greek cities, which necessarily were limited in action to small localities, and even there were subject to those errors arising from the passions of a mob, making it perfectly plain that their idea of a pure democracy was the Athenian democracy, a congregation in which every citizen met, debated and voted; and yet continually these same men are speaking of the "republics" of Greece, among other republics in history. This general use of the word "republic" and "republican form of government" is so thoroughly in the atmosphere of the formative time of this government, as meaning only a popular government generally, without regard to internal form, and this is such elementary knowledge that solemn proof of the fact seems to me to savor of pedantry.

With this apology, I call attention to the following:

The clause of the Constitution which is relied on by the appellants, Section 4 of Article IV, is:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion and on application of the legislature or by the executive (when the legislature cannot be convened), against domestic violence."

If there were nothing else to interpret this section, the company in which the words "shall

guarantee a republican form of government" are found show that the intent was that the stronger government,—the Federal government,—guaranteed to protect each of its weaker integral members against invasion, insurrection and the subversion of the will of the people by force, as by some dictator or powerful faction. Mr. King, in speaking in the Massachusetts legislature upon this section, said:

"If the present Constitution of the State was meant to be guaranteed as a fixed form by the United States, would this not be a great defect as precluding any change by the State itself, should it see fit to do so?" (Elliot's Debates, Vol. 2, p. 101).

This clause in the Constitution was adopted by Hamilton in his plan from Randolph's draft first submitted to the convention, and every utterance of Hamilton, Randolph and Jefferson shows that fearful of ambitious men or factions or secret conspiracies from Great Britain, defeating the will of the people, and erecting an oligarchy or a tyranny by force; the usurpers then sheltering themselves behind State sovereignty, the clause here in question was intended only as an insurance by the powerful combination of all the States to each of the States in its individual weakness that each would be protected in maintaining a government of the people, by the people, for the people. Hamilton's utterances are numerous to the effect that "the foundation of a national government must be laid deeper than in the mere

sanction of a delegated authority." "The fabric of the American empire ought to rest on the solid basis of the consent of the people." In No. 57 of the Federalist, Hamilton says that the objection taken by some against the election of the house of representatives by the whole people "strikes at the very root of republican government," and a little further on, in the same essay, says: "The elective mode of obtaining rulers is the characteristic policy of republican government." His battle in the convention for the principle of universal suffrage and that only the free inhabitants should be entitled to representation are known to every school boy; and he said:

"We are now forming a republican government. Real liberty is neither found in despotism nor in the extremes of democracy, but in moderate governments. Those who mean to form a solid republican government ought to proceed to the confines of another government. As long as offices are open to all men and no constitutional rank is established, it is pure republicanism, but if we incline too much to democracy, we shall shoot into a monarchy. The difference of property is already great among us. Commerce and industry will still increase the disparity. Your government must meet this state of things, or combinations in process of time will undermine your system." Secret Debates, p. 184, Mygatt Edition, Tues., June 29. His use of "democracy" is always in the sense of the Athenian democracy.

It is certainly curious that a political measure such as the initiative and referendum, designed to check that great disparity due to commerce and

industry, which he feared; that inefficiency in purely representative legislation due to the combinations which in process of time threaten to undermine our system, should be bombarded with the clause framed by the very man who uttered the above words. His great fear was that some State might lose its pure republicanism by disparities and combinations which might make "the offices no longer open to all men." Hamilton in No. 9 of the Federalist, speaking of the "petty republic of Greece and Italy," shows that "the science of politics has advanced so that the excellencies of republican government may be retained and its imperfections lessened." He discusses the confederate republic of Montesquieu; and the whole essay shows the use of the words "republican government" as meaning only a government by the people.

Again, in No. 51 of the Federalist, he discusses his theories of republican government, showing that he has no particular form in mind, but simply aims at "a government founded on the consent of the governed."

Lastly, Hamilton, the author of the clause in the Constitution we are discussing, and expounding that very clause, says, No. 21 of the Federalist:

"The want of a mutual guarantee of the State governments is another capital imperfection in the federal plan (meaning the old confederacy). There is nothing of this kind in the articles that compose it; and to imply a tacit guarantee from

considerations of utility, would be a still more flagrant departure from the clause which has been mentioned, than to imply a tacit power of coercion from the like considerations. * * * Without a guarantee, the assistance to be derived from the Union, in repelling those domestic dangers, which may sometimes threaten the existence of the State Constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people; while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded from the union to the friends and supporters of the government. The tempestuous situation, from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative. Who can determine what might have been the issue of her late convulsions if the malcontents had been headed by a Caesar or by a Cromwell? * * * The inordinate pride of State importance has suggested to some minds an objection to the principle of a guarantee in the Federal government, as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union, and can only flow from *a misapprehension of the nature of the provision itself. It could be no impediment to reforms of the State Constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guarantee could only operate against changes to be effected by violence.*"

This is the interpretation of this constitutional clause by the man who drew it upon Randolph's model, and who battled for its adoption. It is harmonious with its general purport and with common sense; and to have the clause itself raised now as a barrier to those very reforms of the State Constitution made by a majority of the people in a legal and peaceable mode to overcome the corruptions of legislatures and the growing tyranny of great commercial combinations is certainly the *reductio ad absurdum.*

Madison expresses the same views in the 43d Federalist.

There is another consideration: The referendum has tacitly existed in the British Constitution since the power of the House of Commons and constitutional government as we understand it today began with Cromwell and the parliament which imposed terms on Charles Second. By Walpole's time it had become a settled political policy that if the ministry were defeated, three courses lay open to it: Either to resign and let the opposition form a new cabinet; or to purchase and corrupt enough members of the House of Commons to change the majority; or to dissolve parliament and take a referendum to the people on the question at issue. So that at the time of the separation, the referendum at least was a well known part of the British Constitution; and we find Hamilton stating that the British Constitution was the best form attainable by us as a model.

Every State Constitution has been adopted by a referendum, and the referendum always implies the initiative, just as the power to delegate always implies the right to act directly.

What is to be said as to the form of the government of Switzerland? Is it a republic, or not? Yet there, by the will of the people, the initiative and referendum exist in full force, and from this republic we have borrowed them.

The Federal convention met upon the resolution to endeavor to formulate "a republican form of government," but the particular details of that form were the subject of the most extended debate, and ranged all the way from the idea of a loose confederacy, as presented by Mr. Paterson, of New Jersey, to the strong centralized plan drawn up by Hamilton.

I apologize for wasting so much time in proving that the clause in the Constitution meant to the founders, and should mean to us, only a guaranty of a government of the people by the people and a protection against anarchy or despotism or usurpation by violence; and I repeat, it seems an absurd conclusion, with all due deference to the brief of the eminent and learned opposing counsel, to have this clause of the Constitution, designed to protect the people in the right of peaceably changing their form of State government to meet new exigencies, used as the means to prevent their doing that very thing.

Political Science is a growth, an evolution. It cannot remain fixed.

Madison, in the 14th Federalist, might have been holding a brief for the initiative and referendum. He says:

"But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the *numerous innovations displayed on the American theatre, in favor of private rights and public happiness.*"

C. E. S. Wood.

III.

Nor does the act under consideration violate any of the provisions of Section 1 of the XIV amendment of the Constitution of the United States.

Assuming that the act under consideration was lawfully enacted the taxes levied thereby must be considered a valid exercise of the taxing power of the State in the light of the following authorities.

Opinion of Or. Sup. Ct., record p. 35, and cases cited therein.

Southwestern Oil Co. *v.* Texas, 30 Sup. Ct. Rep. 496, 497; 217 U. S. 114.

Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 237.

Home Ins. Co. *v.* New York, 134 U. S. 594.

Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 562.

Kentucky R. Tax Case, 115 U. S. 321, 337.

Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, 294.

Amerigan Sugar Refining Co. *v.* Lauisiana, 179 U. S. 89.

W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 468.

Cook *v.* Marshall County, 196 U. S., 261, 268, 273, 274.

Armour Packing Co. *v.* Lacy, 200 U. S. 226, 235.

Delaware Railroad Tax Case, 18 Wall. 206, 231.

2 Cooley on Taxation, 3d Ed., 1095.
City of St. Joe *v.* Ernst, 8 S. W. (Mo.) 558.
Producers Oil Co. *v.* Texas, 99 S. W. (Tex.) 157.
State Tax on R. R. Gross Receipts, 15 Wall. 284, 293.

It cannot be claimed in this case that a tax on gross earnings is even incidentally a tax on interstate commerce.

The pleadings show that they are levied upon the gross earnings of the plaintiff in error from business done entirely within the State of Oregon, and fail to show that the plaintiff in error transacts any interstate business. Also, as shown by the pleadings, it is a corporation organized and existing within and pursuant to the laws of the State of Oregon, and so far as is shown by the pleadings, transacting its business wholly within said State. It only remains under the assignment of error, above cited, page 39 of the record, to ascertain whether the taxes so levied are in violation of the due process or equal protection clauses of Section 1 of the Fourteenth Amendment of the United States Constitution.

This case, so far as those questions are concerned, is identical with the case of Southwestern Oil Co. *v.* Texas, 30 Supreme Court Reporter 496, above cited. Both cases arise out of the levy of taxes on the gross earnings of domestic corporations from business done within the State, and the statutes of the two States in that respect are

practically identical as to the levy and collection of taxes, and subjection of persons failing to comply with the statutory provisions to criminal prosecution.

At page 498, Mr. Justice Harlan, speaking for the court, after discussing at some length the effect of the Fourteenth Amendment, with reference to forbidding the States from taking property without due process of law and making the application to the law under consideration, says:

"No element of due process of law seems to be wanting unless it be, as contended by the Oil Company, that the penalties prescribed for failing to make the 'reports' required by the statute are so severe and exacting as to make it unsafe for the taxpayer to question the validity of such penalties, and thereby interfere with or suspend the collection of the taxes by insisting that they have been imposed in disregard of due process of law. But this point, as to the severity and exacting character of the penalties, need not be now considered, because no penalties are claimed by the State in this action and no judgment therefor was rendered. Besides, the provision as to penalties is not so necessarily connected with the other parts of the statute as to vitiate the entire act, even if that provision should be held to be void. The right of the State, by a civil suit, to recover the taxes imposed, is wholly independent of its right, by suit or prosecution, to recover the prescribed penalties. If the provisions as to penalties should be stricken down, there will still be left a complete act providing for the collection by civil suit of the taxes due the State,"

and further discussing the question under the Fourteenth Amendment as to denying the equal protection of the laws, he says:

"The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment."

He further quotes from the leading cases upon the subject of special assessments and exemptions under the State laws, and shows that none of these are in violation of the equal protection clause of the Fourteenth Amendment. We hesitate to quote the entire opinion, but respectfully call it to the attention of the court as conclusively deciding all questions in the case at bar, as to whether the plaintiff in error is denied the equal protection of the law, or deprived of his property without due process of law.

In the State court, the only questions as to the invalidity of the taxes, regardless of the manner of their imposition, was as to whether they constitute double taxation, or a violation of Section 1 of the Fourteenth Amendment of the Federal Constitution. The plaintiff in error having paid its license fees required of it to exist as a corporation in the State of Oregon and its taxes on tangible property, and having alleged that these included a tax on its franchise claimed double taxation. On the part of the State it is contended that the gross earnings tax now under consideration is an occupation tax, but even if called a tax on the franchise as property valued in proportion

to its gross earnings, the question is practically the same. As shown by the opinion of the court in the record herein, it was held that plaintiff in error is not subjected to double taxation on any of these accounts, and that it had not paid any ad valorem tax on its franchise since there was no law authorizing such a tax at the time of the imposition of the gross earnings tax now under consideration. Whether this is an ad valorem tax, as claimed by the State, is not decided by the State court, but it is simply held that it is not double taxation on the franchise on account of the paying of a license fee to exist as a corporation, or the paying of taxes on its tangible property, and whether this is an ad valorem tax on its franchise or an occupation tax is not now material to the discussion. It might be either, and still not be double taxation or a discrimination against the plaintiff in error, so as to deny it the equal protection of the laws, or deprive it of its property without due process of law.

In several of the more recent cases in this court, involving the validity of State taxation of corporations, the tax has been held invalid, but mainly upon the ground of interference with interstate commerce, which, as already shown, does not arise in this case.

In Southwestern Oil Co. *v.* Texas, 217 U. S. 114, 30 Supreme Court Reporter, before cited, at page 497 the court says:

"In this court it (plaintiff in error) contends only that Section 9 of the statute contravenes the

Fourteenth Amendment. In our consideration of that proposition, we assume, in conformity with the decision of the State court, that the statute is not in violation of any provision of the Constitution or statute of Texas. That is a local question with which this court is not concerned on this writ of error. We are only concerned to inquire whether the statute is inconsistent with the Fourteenth Amendment, either as to depriving the taxpayer of property without due process of law or denying the equal protection of the laws."

In the opinion of the State court in the case at bar, page 35 of the record, it is conclusively shown that the tax under consideration does not violate any provision of the State Constitution or statutes, and this court is powerless to review that question even if the State court were in error. (Poydras De La Lande *v.* Louisiana, 18 Howard 192).

In the Texas case, the question of violation of the Fourteenth Amendment was raised, and there was also an assignment of error that the State court should have held the statute invalid as laying a tax or burden upon interstate commerce. It will be noticed by the answer of plaintiff in error and the order of the court, found at page 23 of the record herein, striking out paragraphs 24, 25, 26 and 27 of said answer, upon the application of plaintiff in error, that no question of interstate commerce can arise on the pleadings, since it is not shown that the gross earnings taxed under the statute, or any part of them, were derived from interstate commerce, that part of the

answer that might relate to interstate commerce having been stricken out by voluntary application of plaintiff in error, nor do we find even in the assignments of error in the record herein anything relating to the interstate commerce clause of the Constitution, but on page 39 of the record, in paragraph J of plaintiff's third assignment of error, it assigns a violation of Section 1 of the Fourteenth Amendment of the United States Constitution. This is the only specification of any violation of the United States Constitution, laws, or treaties, other than those relating to the political complexion of the State government.

We cannot refrain from again quoting from Southwestern Oil Company *v.* Texas, where the court, in discussing the contention that the Texas statute was class legislation, uses the following language (217 U. S., at p. 121):

"It is not questioned that the State may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord all *in the same class* equality of rights. The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the State, in its discretion, to classify occupations for purposes of taxation. The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best by it for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment."

And on the succeeding pages, the court quotes from a number of the leading cases in the United States Supreme Court, announcing the same doctrine, and concludes on page 126, by saying:

"That so far as the power of the United States is concerned, the State has the right by any rule it deems proper to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States. That the requirement by the State that all wholesale dealers in specified articles shall pay a tax of a given amount on their occupation without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law, or to deny him the equal protection of the laws. * * *"

In the case of Belle's Gap Road Company *v.* Pennsylvania, 134 U. S. 232, 237, the court says (S. C. R. 533-535):

"The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may if it chooses exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various pro-

ducts; it may tax real estate and personal property in a different manner. * * * But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. *We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation.* * * *" (Italics ours).

In Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 562:

"A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or any callings unless at the same time it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

In Singer Manufacturing Company *v.* Wright, 97 Ga. 114, at page 117, the court in discussing the authority of the State to classify persons and callings for the purpose of taxation, says:

"The general assembly can tax the occupation of all persons engaged in the liquor traffic, but if it saw proper it could undoubtedly impose an occupation tax upon those only who sold liquors at wholesale. So, it may impose an occupation tax upon persons engaged in the sewing machine business without being constrained to make the tax universal in its operation upon all persons engaged in all branches of that business," and on the following pages continues:

"The plaintiff contends that the tax is not uniform because no tax is required of retailers of machines who are not manufacturers. This contention, in view of what has already been said, cannot be sound, for if the right to classify at all is conceded (and we have shown it must be) even an arbitrary classification would not for that reason alone be unconstitutional, but as just intimated, we do not wish to be understood as saying that the classification made in this instance is arbitrary or unreasonable. It was not necessary to the legality or fairness of the tax that all retailers of machines should be included and required to pay the same amount. The general assembly might well deem it in accord with the sound public policy to encourage the small dealer in his initial efforts to build up a business by exempting him from a tax he could ill-afford to pay, and taxing others in the same line of trade but doing a business the volume of which warranted the additional burden of an occupation tax."

In the light of the foregoing authorities, we fail to see in the Oregon act under consideration herein the slightest infringment of the principles of Section 1 of the Fourteenth Amendment, and refrain from further discussion of the question.

Also, it seems clear from the history of the American people and their government, the action of Congress and the President, in the admission of new States, and the decisions of this court and of the Supreme Courts of many of the States, hereinbefore cited, that the question of what constitutes a republican form of government under the Constitution of the United States is wholly political, and, therefore, beyond the jurisdiction of this court.

However, if the court shall finally conclude to take jurisdiction, we respectfully submit that in any case where there is doubt as to the constitutionality of a law enacted by Congress or the people of a State, the doubt should be resolved in favor of the enactment. The uniform decision of courts, both Federal and State, as we understand them, is to the effect that a statute will not be declared unconstitutional unless it obviously contravenes the fundamental law, and the same rule applies when measuring a State Constitution by the Federal, as in this case. Applying this principle in the case at bar, the action of Congress and the President, admitting Oklahoma and Arizona into the Union of States, with Constitutions including the initiative and referendum; the admission and seating by Congress, without question,

of the Senators and Representatives from South Dakota, Utah, Oregon, and other States, covering the period of twelve years since the adoption of the initiative and referendum by South Dakota; the decisions of State courts that their governments are republican in form, rendered since the adoption of the initiative and referendum provisions of their State Constitutions; the fact that if a somewhat crude, an effective form of initiative for proposing and adopting constitutional amendments was a part of the Constitution of Georgia when the Federal Constitution was adopted; that the initiative and referendum is now and has been from the earliest settlements recognized as a part of the system of local governments in many of the most important States of the Union; we respectfully submit that both precedent and logic unite in approval of the decision of the State court herein, and that the same should be affirmed.

A. M. CRAWFORD, *Attorney General,*
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I. H. VAN WINKLE,
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POINT OF CONTENTION.

Oregon Constitution, Art. IV, SECTION 1.

"The legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly."

Is a tax law invalid under the Constitution of the United States which is thus proposed and thus enacted by the people at the polls?

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Error - When "appellant" appears, read "plaintiff in error."

The Issue: United States Constitution, Article IV, § 4.

The real issue raised by the assignment of errors is to be found in the eighteenth thereof, claiming an invasion of appellant's rights under U. S. Constitution, Art. IV, § 4, as follows:

"Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion: and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

(Exact form as engrossed;—Farrand, Records of the Federal convention, Vol. II, p. 662.)

The other claims under Art. I, §§ 2, 3, 4, 8, 10; Art. IV, § 3; Art. V, relate to the requirements of the U. S. Constitution for legislative action in the States. It may be conceded that these requirements would impose upon the States the duty to maintain legislatures for national purposes, and the short answer to the appellant's claims in this regard is that such a legislature is maintained in Oregon in due form and with full powers to conform to the requirements of the U. S. Constitution.

The claims under the Article of Amendment XIV are not to be considered, because the State of Oregon has promulgated the tax law of which appellants complain, every citizen of Oregon is subject to laws so enacted, and there was due process and equal protection accorded to the appellant pursuant to the Constitution of Oregon. That constitution and

the form of law-making it provides are not subject to revision by this court unless jurisdiction is taken under above Art. IV, § 4.

The Supreme Court of Oregon has determined that there is no infraction of the Constitutions of Oregon and the United States.

"The courts of the U. S. adopt and follow the decisions of the State Courts on questions which concern merely the constitution and laws of the State."

Luther *v.* Borden, 7 How. 1.
Duncan *v.* McCall, 139 U. S. 449.
Taylor *v.* Beckham, 178 U. S. 578.

"The people of the States created, the people of the States can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the Republican form."

Chisholm *v.* Georgia, 2 Dall. 448.

I. The Subject-Matter of Contention.

A. *THE OREGON SYSTEM.*

"The legislative power of the State shall be vested in a legislative assembly—but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly."

"The first power is the initiative" based upon a petition by eight per cent of the legal voters.

"The second power is the referendum" based upon a petition by five per cent of the legal voters.

Such is the plan at issue, adopted by Oregon in 1902.

1. THE PRECEDENT IN SWITZERLAND.

It was not an experiment. Some of the Swiss Cantons had legislated in mass meetings from days of antiquity. After the republic was formed in 1848 by union of the Cantons, all the vices to which free governments are subject rent the politics of the republic. Political bosses, legislative corruption, corporate influences, partisan violence and intrigue were the rule in political life.

In 1874 the referendum was adopted in national affairs, and in 1891 the initiative was added. Experience justified these measures in the Cantons and republic. The evils abated, popular verdicts were found to be considerate and wise, party virulence was allayed, experienced legislators were retained in office, corruption ceased. The system became fixed in the confidence and affections of the people, until it was unshakable. This republic is the best governed country on earth.

Hon. N. Droz, ex-President of Switzerland, said of it: "Under the influence of the referendum a profound change has come over the spirit of Parliament and people. The net result has been a great tranquilizing of public life."

Prof. Charles Borgeaud of the University of Geneva, wrote "The Referendum has won its case. Unquestionably it has proved a boon to Switzerland and has no more enemies of any following in the generation of to-day."

The only Canton in which the political boss and corrupt influences remained dominant was and is Freibourg, where direct legislation did not exist and could not be secured under the tyrannical and venal rule of a political dictator.

South Dakota adopted this system in 1898. Such was the experience which warranted Oregon in adopting this system.

2. DELIBERATION IN ADOPTION.

The passage of the constitutional amendment for direct legislation in Oregon was not the result of caprice. It had

long agitation in the press and party conventions. In the legislature of 1899 there were only 13 opposing votes. Both political parties approved it in their conventions of 1900. In the legislature of 1901 there was but one opposing vote and in 1902, when the vote was taken, all the political conventions favored it, and it passed by 62,024 yeas to 5,668 nays.

It should be noted that this amendment was the result of the vote of the legislature, submitting it to popular vote according to the then existing constitutional forms.

Not only has Oregon adopted the constitutional amendment, but in 1910 by vote 23,143 yeas to 59,974 nays (questions submitted Nos. 304, 305) on reference to a referendum by the legislature, a proposition for a constitutional convention was defeated.

Oregon Election Pamphlet, 1910, p. 18.

The argument used against this convention and which defeated the proposition was that its purpose was to have the convention take out the Initiative, Referendum and Recall from the constitution and then proclaim its enactment without submission to the people for ratification.

3. PRACTICABILITY THROUGH THE MODERN BALLOT.

It must be borne in mind that this case involves a method of procedure in State affairs which was not in 1787 practicable. So far was the ballot then unknown that the people of New York in framing their first constitution gave the legislature authority to make a trial of the ballot system and to repeal the provisions if the system did not prove practicable. Furthermore, distances and methods of communication offered at that time obstacles which are now inconsiderable. The possibility of extending a town meeting to the limits of a State had not occurred to anyone at that time owing to the apparent physical difficulties. Now, however, experience has demonstrated that an actual poll of the people can be taken upon

any proposition with ease and certainty. In considering, therefore, all old authorities which suggest that the delegation of legislative power is an essential feature of our form of government, we must accept such statements with the limitations of the then existing methods. All statements of this nature must be regarded as *obiter dicta* and not applicable to the existing conditions which have been produced by the growth and development of our electoral system.

4. EXCLUSION OF "CAPRICE" AND "MOB RULE."

There is another feature which must materially qualify the views of all previous statesmen and judges. In contemplation of previously existing Democratic forms, the actual physical assemblage in one place of all the people was involved. No doubt there may be in popular assemblages a high degree of nervous tension, susceptibility to the influences of speech, of cabal and of skillful leadership. A condition of excitement may be created which is not consistent with careful deliberation and which may contain too much of the element of sentiment or sympathy.

Even these conditions may not be inconsistent with decisions which in the long run are righteous and advisable; there may be occasional lapses from good judgment, but the town meetings of New England are living illustrations of the general reliability of popular assemblages in the decision of public questions.

There has been ample opportunity in 300 years of experience with these gatherings to test the dangers of what is so lightly designated as "mob law," and "the caprice of the majority," but it may be said that no institution in our country has so well stood the test of experience as the New England town meeting.

The jury system is open to similar objections, but it has persisted nonetheless and has become one of the cornerstones of the fabric of human liberty.

These considerations emphasize the absence of the dangers to which popular gatherings are exposed by physical contact, where such methods of deliberation are provided as we find in Oregon under the direct legislation system. Petitions for legislation must be filed three months before the day of election. Not only are the questions to be considered matters of general public notoriety, but the State of Oregon provides that citizens may offer argument for and against the proposed measures and these arguments, together with the text of the proposal, are printed at the expense of the State and placed in the hands of all the voters. There is thus laid before the voters complete information as to the measures upon which they are to vote, and carefully epitomized arguments for and against them. These matters are before the voter in his home, the object of study, deliberation and discussion. He is freed from passion or influence in the consideration of his duty as a voter, and probably in the history of Republican institutions, no better system has been devised for securing from the voter a calm, dispassionate and patriotic decision as to his duty with respect to proposed legislation. "Mob Rule" is far removed from this system.

It will also be observed that the voter is not called upon to study the character of men but the merits of measures, and an entire shifting of the character of political discussion is thus accomplished. Personalities of men cease to be determining factors when the merits of concrete propositions become the objects of consideration. The training of the voters in their public duties is such as to practically revolutionize the character of political controversies, to elevate the standard of citizenship, suppress passion and prejudice and to bring nearer than ever to perfect form, the deliberations of the people upon their own affairs.

B. *THE DEMAND FOR THE SYSTEM.*

1. IMPERFECT POLITICAL CONDITIONS.

It is apparent that our country is in a condition of reaction against the control of privilege as powerful as that of France in 1792, of England in 1838, of Switzerland in 1848.

In France the republic was created, in England parliamentary government became a reality, and in Switzerland the Union of States was perfected; here we are perfecting our Democracy. The present movement constitutes the most momentous political revolution in our history, conducted without bloodshed and even without acrimonious political contests. It is a movement economic in its nature and accordingly steady and irresistible. Its objects are political, and it moves on like a tidal-wave which legislatures and courts cannot halt.

The causes of this movement are apparent. Political organizations have not been responsive to the popular will. The effort to obtain good government by the selection of "good men" has failed. Legislators have become the people's masters in the exercise of unlimited power. Party platforms are not regarded as pledges. The people are unable to trust their servants. A power has developed which dominates politicians, parties and public servants. Evidences of repeating, bribery, corruption and perversion of delegates, representatives and officials in cities and States have persisted, and even the judiciary has at times been found subject to influences, hostile to the people's interests. The average citizen has abandoned efforts to regulate party machinery and to participate in party caucuses.

The new political movement aims to clear the avenues between the people and their institutions.

The perversion of party caucuses has been met by the plan of direct nomination of candidates at the polls. Even the direct nomination of delegates to Presidential conventions is being accepted; repeated scandals and notorious corruption of

legislatures in the election of U. S. Senators have caused two-thirds of the States to devise methods of circumventing the constitutional method of election by the legislatures, and it is probable that in the immediate future the National Constitution will be amended to secure direct election of Senators by the people.

The numerous laws of States for the prevention of corrupt practices and the limitation of campaign expenditures have been supplemented by national legislation, which is probably but the beginning of drastic enactments to maintain the purity of elections.

2. FAILURES OF THE LEGISLATIVE SYSTEM.

The founders of the Republic dreaded the power of the executive. Patrick Henry inveighed against it. Jefferson insisted with impassioned force that the Republic would fall through the usurpation of power by the judicial department.

Prophecy takes a hard test by the light of experience. All fear of the executive has ceased after more than a century of trial. For the first time the judiciary has become a subject of apprehension in the last few years.

But it is the legislative department that has proved the weakest of the departments of State.

The people are strengthening this branch of Democratic government by applying more Democracy.

The Sovereignty is being placed in practice, where it exists in theory, with the people; the instrument is Direct Legislation.

In adopting this system there have been no interferences with the regular operations of the customary legislative machinery. Representative government remains, but its products are no longer beyond popular reach. Vicious and corrupted acts can no longer be fastened upon the people against the will of the majority.

Experience has proven that it is not safe to trust delegates with unlimited power to make laws, and the question presented in this case is whether there remains in the people the power to apply controlling influences to them.

The history of this year's legislation furnishes a long list of broken pledges.

The governors of Colorado, Maine, New York, New Hampshire have publicly denounced the legislatures of their States for failure to redeem the direct promises of party platforms.

Governor Shafroth of Colorado declared that in the longest legislative session in thirty years not a pledge has been redeemed.

In Maine a direct primary act was refused by the legislature and at the polls under the "initiative" amendment of the Constitution, the measure was adopted by vote of 55,840 yeas to 17,751 nays.

In 1902, under a law permitting an expression of public opinion at the polls, the people of Illinois favored by a vote of 428,000 to 87,000 a Constitutional amendment providing the initiative and referendum. The legislatures for eight years took no action. In 1910 the people again made the demand by vote of 447,908 yeas to 128,398 nays. All the political platforms indorsed it. The legislature this year has refused to pass the measure.

Two investigations are now in progress involving corruption in the election of Senators of the United States; it is not denied that $107,793 was expended to secure the election of a Senator by the legislature of Wisconsin.

Even in England faith in Parliamentary government has been shaken. Mr. Lecky says:

"A growing distrust and contempt for representative bodies has been one of the most characteristic features of the closing years of the nineteenth century."

Democracy *v.* Liberty, I. pp. 142, 143.

Mr. Dicey remarks:

"Faith in Parliaments has undergone an eclipse."

13 Harvard Law Rev. 73, 74.

Gov. Woodrow Wilson has described the political situation as follows:

"Many of the old formulas of our business and of our politics have been outgrown. We still revere 'representative government,' but we are forced to admit that—the governments we actually have have been deprived of their representative character. They do not represent us. They are filtered too fine through the sieve of secret caucuses and other machine processes; there are too many conventions preceded by too many private conferences between us and the persons through whom we legislate and conduct our governments.

We, the people, have not free access enough to our own agents or direct enough control over them. We mean by one change or another to make our governments genuinely popular and representative again. We are cutting away *anomalies not institutions.*" Boston Common, May 13, 1911.

Such are the failures and scandals which have created distrust in parties and legislatures and caused the people to secure direct control of their political machinery, their officials and legislative bodies through direct primaries, elections and legislation.

"States and governments were made for man; and at the same time how true it is that his creatures and servants have first deceived, next vilified and at last oppressed their master and maker."

Mr. Justice Wilson in Chisholm *v.* Georgia, 2 Dal. 455.

C. *THE EXTENSION OF THE SYSTEM.*

1. CONSTITUTIONAL AMENDMENTS ADOPTED.

The system of the initiative and referendum has been adopted by popular votes as follows:

State.	Year.	Yea.	Nay.
South Dakota,	1898		
Utah,	1900		
Oregon,	1902	62024	5668
Montana,	1906	36374	6616
Oklahoma,	1907	180333	73059
Maine,	1908	51991	23712
Missouri,	1908	177615	147290
Arkansas,	1910	91363	39680
Colorado,	1910	87141	28698
Arizona,	1911		
California (latest unofficial),	1911	138181	44850

Utah voted an amendment for direct legislation in 1900 but left it to be executed through enabling acts of the legislature, which acts have not been passed.

Thus eleven States have already incorporated the initiative and referendum into their Constitutions.

The legislatures of the following States have voted to submit the initiative and referendum for popular ratification: Nebraska, Wisconsin, No. Dakota, Wyoming, Washington.

In Nevada, where the referendum is in the Constitution, the legislature passed this year a resolve for the initiative for the second time, and the amendment is to be voted on at the next election.

As such amendments (excepting a defective proposal in Missouri in 1904) have never been rejected by popular vote in any State, it is not impossible that, by the time the court

reaches its decision in this case, these six States will have been added to the list and that seventeen States will then have adopted this system.

2. MOVEMENTS IN OTHER STATES.

The legislature of Idaho has submitted for popular vote the Constitutional amendment for the referendum.

In New Mexico the Democratic platform declared for the initiative and referendum, but only the referendum was incorporated in the Constitution.

Illinois in 1901 adopted an advisory initiative, and as above stated (I. B. 2), the legislature of the State has refused to accede to the demands of enormous majorities in favor of the Constitutional amendment for the initiative and referendum.

In Illinois (in 1910) both party platforms favored the initiative and referendum.

In 1906 the people of Delaware by popular vote instructed their legislature to provide a Constitutional amendment for the initiative and referendum.

In Delaware March 17th, 1911, the House of Representatives voted on the Constitutional amendment for the initiative and referendum by 16 yeas to 9 nays, 2/3 vote being necessary for a passage.

The municipalities in more than one-half of the States of the Union have received charters containing the initiative and referendum.

In Iowa the recent legislature rejected the amendment in the House by a vote of 58 yeas to 42 nays.

In Kansas all the political parties declared for the initiative and referendum in their platforms of 1910, but the measure failed of the necessary 2/3 vote in the legislature. The House of Representatives passed the measure by 107 yeas to 10 nays; the Senate defeated the measure by a vote of 23 yeas to 15 nays, a 2/3 vote being required in both Houses. Gov. Stubbs was elected on the platform pledged to the initiative and referendum.

In Michigan a vote for the Constitutional amendment passed the House by 74 yeas to 20 nays, but the Senate defeated the amendment by a vote of 15 yeas to 14 nays, a 2/3 vote being required.

In Minnesota, the Democratic platform declared for this Constitutional amendment, but the resolve was defeated in the legislature.

In Massachusetts a Constitutional amendment was defeated June 27th, 1911 by a vote of 125 yeas to 75 nays, 2/3 being required.

In West Virginia Gov. Dawson in his annual message endorsed the initiative and referendum and prophesied the passage of the resolve.

In Ohio, Gov. Harmon was elected in 1909 on a platform pledged to the initiative and referendum.

In New Hampshire the Democratic platform of 1910 pledged the party to the initiative and referendum.

In New Jersey the present Governor is in favor of such amendment.

In Pennsylvania in May, 1911, the judiciary committees of both branches of the legislature reported favorably upon the passage of a Constitutional amendment for the initiative and referendum.

3. NATIONAL MOVEMENT.

The Democratic National platform adopted at Kansas City in 1900 declard for the initiative and referendum.

On the 12th day of June, 1911, a memorial was presented in the Senate of the United States from both branches of the Wisconsin legislature calling for the submission of an amendment to the United States Constitution to provide for the Initiative, Referendum and Recall for legislation and officials and the initiative for Constitutional amendments.

Within the dominant party a new organization has been formed entitled the "National Progressive Republican League.

It has leaders of great ability, and from the Mississippi to the Pacific is rapidly obtaining control; it proposes to contest for the control of the next National Republican convention. Its platform of principles is confined to five measures, designed for the sole end "that the people may control and hold their officers responsible." These are the measures:

1 Direct election of U. S. Senators by the people.

2 Direct primaries for nomination of elective officers.

3 Direct election of delegates to National conventions.

4 Constitutional amendments for Initiative, Referendum and Recall.

5 Thoroughgoing corrupt-practices' act.

The force of this movement is made more powerful by the fact that both political parties are involved in it, and that in many States all the parties have united in its favor.

Sen. Works of California, April 10-'11, in the Senate spoke as follows:

"Congress need not delude itself with the belief that this demand for direct legislation comes from fanatics and radical reformers only. The demand is universal and is supported by the best citizens in the country without regard to party. The absolute necessity for some legislation that will put the people in possession and control of their government, and drive the interests and political bosses out of politics, and the official life of the nation is too evident to admit of question."

This sweeping assertion of the strength of the popular demand has been justified by the enormous majority of the votes recently cast in the Senator's own State in approval of the Initiative, Referendum and Recall.

As in all the cases involving Art. IV, §4, this Court has denied jurisdiction, scant consideration has been given to the interpretation and construction of the provision, "the United

States shall guarantee to every State in this Union a Republican form of government."

If in the case at bar this Court should undertake to review the powers, political or judicial, which are conferred by this provision, it is submitted that many statements made *obiter* concerning it, may need explanation and revision. Many important questions yet unconsidered may be or become of supreme importance, which are involved in the terms of

II. The Guaranty.

A. *THE DEMAND FOR THE GUARANTY.*

Quotations could be multiplied to show that the entire direction of the people's thought was toward the protection of national as well as State governments against the return of the tyrannies which they had just thrown off by rebellion.

"In truth," said Jefferson, "the abuses of monarchy had so much filled all the space of political contemplation that we imagined everything Republican, which was not monarchy." Letter to Kerschieval, July 12-1816.

The sole purpose of the guaranty clause was to protect the Union and States against monarchial and aristocratic changes.

Cooley Constitutional Limitations (7th Ed.) p. 28.

"to defend the system against aristocratic or monarchial invasions," says Madison. Federalist, Letter 43.

Patrick Henry cried out against the Constitution, "away with your president; we shall have a king; the army will salute him Monarch!"

Franklin feared that the government would result in monarchy. Elliot's Debates.

From the Philadelphia convention not a word can be cited to show that the fear of an extension of popular sovereignty had any place in the minds of the delegates.

"At this rate," said Nathaniel Gorham of Massachusetts, "an enterprising citizen might erect the standard of monarchy in a particular State; might extend his views from State to State, and threaten to establish a tyranny over the whole, and the general government be compelled to remain an inactive witness to its own destruction." Elliot's Debates, Vol V., p. 333.

"The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but on the other hand, entirely through fear of what might result from the exercise of the power granted to the central government.

South Carolina *v.* U. S., 199 U. S. 457.

B. *HISTORY OF THE GUARANTY CLAUSE.*

The act of the Confederation Congress, April 23d, 1784, contained the precedent for this provision.

Gerry of Massachusetts, Sherman of Connecticut, Spaight of North Carolina, later members of the Constitutional Convention of 1787 voted on the measure giving power to the people of the northwest territory to form governments, and providing "Sixth. That their respective governments shall be Republican."

A later act of the Confederation Congress of July 13th, 1787, contained the same provision.

The history of the progress of Article 4, Section 4, in the Constitutional Convention of 1787 appears from Elliot's Debates, Volume 5, to be as follows:

The measure first appeared in what is known as the Virginia form introduced by Edmund Randolph in this shape,

Art. XI, "Resolved that a republican form of government and the territory of each state except in the instance of a voluntary function of government and territory ought to be guaranteed by the United States to each state." (Page 122)

Later an amended form of the article appeared as follows:

"That a republican constitution and its existing laws ought to be guaranteed to each state by the United States." (Page 182.)

James Madison, Jr., Virginia, moved to substitute, "That the constitutional authority of the states shall be guaranteed to them respectively against domestic as well as foreign violence."

William Churchill Houston of New Jersey objected to perpetuating the existing constitutions, instancing that of Georgia as "a very bad one." (Page 333.)

Edmund Randolph moved to add as an amendment "And that no state be at liberty to form any other than a republican government." (Page 333.)

James Wilson (Pa) moved as a better expression of the idea "that a republican form of government shall be guaranteed to each state and that each state shall be protected against foreign and domestic violence." (page 333.)

Mr. Madison and Mr. Randolph thereupon withdrew their propositions.

The article emerged from the committee on detail as "The United States shall guaranty to each state a republican form of government" etc. (page 381) and the final form was the same excepting for the substitution of the word "every" for "each" and the addition of the words, "in this Union."

C. *WHAT IS THE GUARANTY?*

The word "guaranty" has, and at that time had, a well defined legal significance.

"A guaranty is a promise to answer for the payment of some debt or the performance of some duty, in the case of the failure of another person, who in the first instance is liable."

Kent's Com. (12 Ed.) Vol. IV, p. 121.

"The contract of guaranty is a collateral undertaking. It cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person either express or implied, that is to say if there is no debt, default or miscarriage, present or prospective, there is nothing to guarantee and hence can be no contract of guaranty."

Brandt on Suretyship and Guaranty, §1, n. 1, p. 5.

This word was not adopted carelessly or without meaning It was clearly distinguished from the later promise of protection, and there is also significance in the fact that the guaranty was to "every State" while the promise of protection was to each. These men long skilled in the framing of their revolutionary documents understood the use of words.

Edmund Randolph, Alexander Hamilton, Gouverneur Morris, Wm. C. Houston, John Rutledge, James Wilson, who debated this article were lawyers, and understood the exact legal meaning of the word "guaranty."

D. *WHO ARE THE PARTIES TO THE GUARANTY?*

A guaranty involves three distinct parties:

1st the promissee, the beneficiary.

2d the promissor, the original obligor.

3d the guarantor, assuring the promissee for the benefit of the promissor.

A guaranty is an agreement not for the interest of the guarantor. The promissee is directly named to wit "every State in this Union;" the original promissor is also included in this category. Each State becomes the original promissor to every State, that it will maintain a Republican form for the benefit of each and every State.

The undertaking of the States themselves under the guaranty clause may be a repetition of the description of the social compact in the Massachusetts Constitution—"the people covenants with each citizen and each citizen covenants with the whole people, &c," which being applied would read, "The States covenant with each State and each State covenants with all the States, &c," and the undertaking of the United States is to guarantee the performance of these covenants.

E. *WHO HAS THE POWER OF INITIATIVE?*

This question must be answered in contemplation of the powers described and reserved in the Constitution of the United States. By Art. 1, § 1, the legislative powers of Congress are confined to the powers "herein granted." Therefore the Congress takes away no powers from the people of the States, except those contained within the pages of the United States Constitution.

But the peoples of the States forced upon the Constitution explicit additional declarations as to the reserved powers of the people of the States. Art. IX declares, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others *retained by the people*," and

Amend X. "The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States* are reserved to the States respectively *or to the people*."

1. A STATE MUST MAKE THE DEMAND.

Clearly only the promisee can demand enforcement and the only promisees under this guaranty are the States.

Judge Story ("Constitution," Vol. II, § 1815) declares that this section of Art. 4 was phrased to prevent the intermedling of the National government with the States, and quotes Mr. Madison as his authority.

George Ticknor Curtis (Const. History of U. S., Vol. 1, p. 363) declares this section to be for the security of the States.

John Randolph Tucker ("United States" Vol. II, § 311) declares that the power of the initiative in the National government would "make this clause, intended for protection, an excuse for destructive invasion."

If the promisees are satisfied how shall the guarantor intervene?

A state will not move unless it regards the offending State as violating republican forms, and it will be guided in making its demand not upon the judgment of the United States but upon its own interpretation of the meaning of republican forms.

It might even be that republican forms were plainly involved, yet a dependance upon the ability of the people to restore them, might prevent another State or even the State itself from asking national interference. The States might not desire to make a demand for enforcement, and if the promisees were all satisfied, there could be no basis for enforcement. It may be a matter of mighty practical importance whether the U. S. can interfere of its own motion in a State's affairs under this Article, and if it cannot it seems to be plain, that another State and not this court has the sole right to judge whether the republican form is involved and whether the United States should be called upon to interfere.

2. A CITIZEN CANNOT DEMAND ENFORCEMENT.

The appellant has no standing in this Court. The guaranty is not to a citizen, but to every State of the Union. Whether the political organization called the State or the people in general is meant to be the object of guaranty is immaterial. The State alone can call for the guaranty.

Later in the article the call for assistance against internal violence is limited to legislature or governor, but when the guaranty is demanded it seems clear that a majority of the people or their recognized representative authority may call for it and none other. No one citizen can appeal even to Congress to enforce this guaranty. A minority would be insufficient and much

less can such an appeal be made by an individual to this court to ignore the recognized course of self-government in any State.

It is notable that the promise to "protect against domestic violence" is a direct promise imposing an original obligation upon the United States. Yet there is a specific limitation upon the persons who can call for the protection.

It would be the very farce of construction should it be held that upon a collateral obligation to states, a private citizen of such state could set the machinery of the national government or of this court in motion against a state.

8% of the voters of Rhode Island form the constituency of a majority of the senators in the Rhode Island Legislature; thus a fraction of over 4% of the voters can block all legislation.

A priori this would be clearly the denial of a Republican form; yet it would be a surprise should one citizen of that State appear here or before Congress to demand enforcement of the guaranty against such forms.

The admission of a private citizen to ask for the enforcement of this guaranty must apply to Congress as well as to this Court. One citizen could always be found to serve the purpose of any cabal, which might wish to turn the armies of the nation into a state to change alleged unrepublican forms. A mere pretence would suffice. Shortly stated: the United States and its departments have no powers under this Article except upon the application of some State of the Union.

The doubts prevailing in 1887 as to the safety of the States against a powerful centralized government emphasize this construction, and the careful safeguards that provide against volunteer "protection" lend strong support.

F. *THE METHOD OF ENFORCEMENT.*

1. BY CONGRESS.

Clearly, this guaranty can only be enforced by the United States, which makes the promise. It is a political obligation.

In the case of new States it has been the practice from the beginning, for Congress to enforce this guaranty by specifically requiring that the Constitution of such State shall be "Republican in form" and "shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Such is the established formula.

It is inconceivable that the Congress should be recognized in the enforcement of this guaranty against new States, and not be the power authorized to enforce the guaranty against an existing State.

Congress and the President hold the executive machinery; they alone can employ the army and navy, the arsenals and fortifications, the marshals, the militia, the national treasury; all essential to the enforcement of this contract with the States.

Congress and the President are "the United States" in contemplation of our organic forms.

In Congress all interests are represented when the question of Enforcement arises. The respective States have their representatives there to admit or protest.

2. THE REMEDY IS POSITIVE.

The method of executing a guaranty to a State is not to ignore the State and its regular acts until it gets back to the prescribed forms; a positive remedy is involved in the guaranty; a remedy by restoration not by nullification.

The guaranty contemplates an invasion of "republican forms," duly protested by one of the States. The duty of the United States is then to restore those forms.

Presumably the violation of form must be Constitutional or Statutory, and the duty of the government would be to demand a repeal of such provisions and the enactment of proper forms.

A case in point would be a constitutional recognition of heredity in official tenure. The United States could compel a repeal. A self-perpetuating legislature could be deprived of its powers.

Until, however, the United States intervenes, the ordinary operations of government and laws will be recognized.

The guaranty is not that there shall never be in any State forms which are unrepublican, but that if there be such, then upon proper demand of a State, the required forms will be restored.

3. NULLIFICATION OF EXISTING LAWS NOT THE REMEDY.

There is nothing in this section four which suggests that so long as an unrepublican form is *de facto* recognized in the State itself, the enacted laws and settled Constitution are to be nullified. A status is merely created upon which the State is entitled to resort to the United States for the restoration of republican form; till then neither the United States nor this Court can be required or allowed to decide at what point republican forms become inoperative and to ignore the legislative, executive and judicial products of such irregular machinery. If such were the case all the laws of eight States which have utilized the initiative and referendum would be *prima facie* void. Executive acts and judicial findings involving the initiative and referendum would be illegal. No such wholesale nullification is contemlated in a guaranty.

"Among those matters which are implied, though not expressed, is that the nation may not in the exercise of its powers, prevent a State from discharging the ordinary functions of government."

"The Constitution provides that 'the United States shall guarantee to every State in this Union a Republican form of government.' That expresses the full limit of national control over the internal affairs of a State."

South Carolina *vs.* U. S. 199 U. S. 261.

The guaranty shortly stated is: If the States will enter into this compact and create a centralized power through a

contribution of sovereign power by each and all the States, this United States will not impose upon you any unrepublican forms, and if from any source these forms be imposed upon you, we guarantee to restore them; but it cannot be implied that the United States by any department, will *ex mero motu* or in behalf of a private litigant, ignore all the regular acts of a State government which may, in the judgment of the United States, date from the beginnings of unrepublican forms.

4. THE GUARANTY IS OF "FORM" NOT OF PRACTICE.

Colorado has been recently under martial law; yet the utmost which could be demanded was that the United States by its political instruments, should suppress domestic violence upon the request of the legislature or governor.

Had a dictator assumed tyrannical functions, it is submitted that if the Constitution contained the requisite republican forms, the United States could not be called upon to redeem its guaranty, inasmuch as the requisite forms existed and it only remained for the people to insist upon them. While in so insisting the people may require the protection of the United States under the final clause of Article 4, Section 4, the form alone of lawful government is assured by the first clause; anarchy and other unrepublican conditions are only reachable on the constitutional call of the State for protection against domestic violence. If through the established forms the State asks no redemption of the guaranty, practical anarchy is no concern of the United States and certainly not of this court under the guaranty clause.

A fortiori peaceful behests of the majority in Oregon under forms satisfactory to them must be honored by the United States and this court until the guaranty is duly demanded by a State.

B. *JURISDICTION OF THE COURTS.*

1. STATE COURTS.

The Supreme Court of Oregon has decided that the law of which complaint is here made is constitutional and Appellant is not allowed in this court to question the validity of its State Constitution.

"The Constitution of the United States enumerates specially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a State as to the formation or change of their Constitutions."

"If it be asked what redress have the people if wronged in these matters, unless by resorting to the judiciary, the answer is, they have the same as in all other political matters. In those they go to the ballot-boxes, to the legislature or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions and amendments of the Constitution."

Luther *v.* Borden, 7 How. 54.

It is not denied that the legislature had power to repeal the act of which appellant complains, and that appellant has not secured action from this body, which is still open to it to overturn this enactment.

When called upon to review the legality of legal enactments in Texas, this court expressed itself in language well applicable to the case at bar:

"The State (of Texas) is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the ordinary and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination of itself involves no infraction of the Constitution of the United

States and raises no federal question giving the courts of the United States jurisdiction."

Duncan *v.* McCall, 139 U. S. 449.

2. UNITED STATES COURTS.

"It was long ago settled that the enforcement of this guaranty belonged to the political department."

Taylor *v.* Beckham, 178 U. S. 578.

And the court adds that after appeal to the State tribunals "any remedy is to be found in the august tribunal of the people, which is continually sitting and over whose judgment on the conduct of public functionaries the courts exercise no control."

The opinion of Chief Justice Taney in the case of Luther *v.* Borden, (7 How. 1) is one of the monuments of his masterly ability, and with apparent prescience he has covered the issues of jurisdiction here involved. Should his reasoning in that case be not followed and should this Court declare the Constitution of Oregon invalid as here claimed, the political effects might be even farther reaching than those of this great justice's opinion in the Dred Scot case.

With respect to the enforcement of Art. IV, §4, the Chief Justice says:

"Under this article of the Constitution (Art. IV, § 4) it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper Constitutional authority. And

its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

"It rested with Congress too to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere."

"But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. There being so different tastes as well as opinions in politics, and especially in forming Constitutions, some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves. And those others are no more Locke than an Abbe Sieyes, but the people. Judges, for Constitutions, must go to the people of their own country, and must merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation." Mr. J. Woodbury (p. 51) *et seq.*

"Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the

people to make Constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when Constitutions and laws are made and put in force by others, then the courts, as empowered by the State or the Union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after their's ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them."

"The disputed rights beneath Constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are *per se* questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making Constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights—not what is *meum* and *tuum*—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own

invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times."

Mr. Justice Swayne, in dealing with the claim that the Constitution of Georgia was adopted under coercion of Congress, says:

"The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the Judicial is bound to follow the action of the Political Department of the Government and is concluded by it."

White *v* Hart, 15 Wall. 646.

This appellant seems to be the only citizen of Oregon, who is agitated by these alleged unrepublican forms.

The Governor and the Legislature of Oregon report no violent interruptions of their duties; the duly constituted courts of the State have peacably dismissed the appellant's complaints; its senators and congressmen attend in the same building with this court; the attorney-general comes here presumably officially representing the people of Oregon and the State of Oregon, and no one asks to overthrow the established and constitutional forms of that State, save this corporation, a creature of the State, whose very life could be lawfully destroyed by the State of Oregon, before its complaint reached this court.

No other State complains that the guaranties of the United States Constitution are violated. No report has come to Congress and the President, who have the armies of the United States at their back, that the republic has ceased in Oregon and must be restored.

It seems imperative that one question should first be considered and answered by this court, viz:

How will the reversal of this judgment guarantee to the State of Oregon a Republican form of government?

Despite this court's decree, the people of Oregon may continue their system, subject only to the inconveniences which attend specific refusals of this court to recognize the initiative laws as valid.

This court can guarantee only that with every opportunity it will declare initiated acts void—but this will not change the form of government of Oregon. This court's only method of guaranteeing a Republican form (as it may construe such form) is by some positive act, such as sending its marshals to enforce an injunction against voting for such laws.

An injunction would hardly operate upon all the voters of a State, and could not prohibit them from voting as they please.

The marshals who alone can enforce this court's decree, are the officers of the political department, appointed by the President. The President might remove them for making such an effort: Congress having recognized this system as Republican, might take away the appellate power of this court to prevent its interference in such cases. Thus the proposition is emphasized, that the guaranty is for enforcement by the political power, which alone possesses the instruments to enforce its orders. This court in plainly not equipped to enforce this guaranty.

H. *EFFECT OF JUDICIAL DECREES.*

1. THE NULLIFICATION OF INITIATED LAWS.

The only operation which a decree of the court could have would be to outlaw the State of Oregon, at least so far as its Constitution, laws and institutions are based upon "initiative" proceedings.

The court could upon any appeal from the courts of Oregon, refuse the enforcement of judgments based upon such enactments. In the eyes of this court such constitutions and laws would be void *ab initio*. If they were not void *ab initio* this appellant has no standing.

The following Constitutional Amendments and Acts were enacted last year at the polls in Oregon on initiative petitions:

Constitutional Amendments.

For the regulation of taxation by counties.

Giving cities and towns power to license or prohibit the sale of liquors.

Providing jury verdicts of three-fourths, separate summonses for grand and petty juries, regulating retrials, fixing terms, increasing jurisdiction of Supreme Court, and fixing tenure of judges.

Extending debt limit for counties for road making purposes.

Acts for

A tax to support a Normal School.

Amendments of Direct Primary law and corrupt-practices' act.

Fixing employers' liability.

Prohibiting taking of fish.

Are these laws organic and functional void *ab initio?* The appellant can only stand upon that ground with respect to the tax imposed upon him.

As a judgment in its favor must be on the ground of the unconstitutionality of the method of making the law, it would require no further judgment of this court to nullify all laws, institutions, taxes, territorial divisions, judicial proceedings, etc., which in ten different States may have been established by this same method.

If the people have no right to propose laws without the intervention of a legislature, it would seem to follow that they cannot alter their constitutions by the same method: the two propositions are inseparable.

2. CONFLICT WITH CONGRESS.

Congress and the President have already after full discussion admitted to the Union the State of Oklahoma and agreed to admit the State of Arizona, under Constitutions containing provisions for the initiative on Constitutional amendments and statutes, which follow almost in exact words the Oregon amendment.

For more than a century this Court has recognized the power of Congress to determine whether the Constitutions of States applying for admission to the Union are republican in form. It cannot be that a different department of the government is to decide upon the republican forms of States already in the Union. The very proposition involves an irrepressible conflict.

Certainly Oklahoma and Arizona have no greater rights in the Union than has the State of Oregon. And if this Court should now declare the Constitution of Oregon to be unrepublican, it cannot avoid a like decree against Oklahoma and Arizona. That Congress would assert its rights and defend with its political power the legality of the Constitutions, which it has expressly approved, is unquestionable. It would likewise extend its protection to Oregon, Maine, Missouri, South Dakota, Nevada, Utah, Montana, Arkansas and California.

If Congress thus recognizes these Constitutions, it is clear that the other States must give full faith and credit to the public acts, records and judicial proceedings of these States, and this Court would be the only tribunal to ignore or deny their Constitutional regularity.

Such a conflict is inconceivable; yet it would be opened if this appellant should prevail.

This Court might impede by its decrees the operations of Statehood, but it is plain that only Congress could enforce the guaranty to which the United States has pledged itself.

(As to the proceedings for the admission of Oklahoma and Arizona, see *infra* III B, 2, a. and b.)

Chief Justice Taney in Luther *v.* Borden gave the logical forecast of such a conflict between the judicial and political departments in these words:

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the Court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the Court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."

III. The Basis of Construction and Interpretation.

A. *THE GENERAL RULES.*

It is submitted that in construing and interpreting Art. IV, § 4 there must be a material departure from the rules ordinarily applied to the Constitution of the United States.

National powers were acquired by delegation of sovereignty from the people of the States. When the limits of these powers are in question it is a proper and necessary inquiry what the people of the then existing States intended to delegate to the United States. The national powers cannot be extended beyond what were then intended to be conveyed. Hence the minute inquiry into the interpretation then put upon the Constitution. It would seem that even in this inquiry the opinions of those who comprised the convention, which framed the Constitution, are given too much weight,

inasmuch as the meetings were secret and these opinions were not known to the people. The debates before the people and in the ratifying conventions would seem to be entitled to greater weight, as they may be taken to have fairly expressed the opinions of the people whose consent gave effect to the instrument.

But we deal now with a different case, viz., a provision of guaranty, which is for the benefit of the States and in which the States, not the United States, are the interested parties. The guaranty was not designed to deprive the States of any sovereign powers not expressly delegated in the national constitution, and the IX. and X. amendments emphasized this fact.

Hence, not only, as has been heretofore submitted, are the States alone entitled to call for the enforcement of the guaranty, but the prevailing opinions of the States become of dominating importance in determining what is a "republican form." If the States are content with the present forms of the State governments there can be no call for the guaranty.

Hence it is submitted that present public opinion is the foremost test in construing this guaranty.

Next in importance seem to be the precedents established by Congress, which is invested with power to admit new States, and therefore from time to time establishes the forms, which, like those of the original states, cannot be impeached.

Any opinions of the courts not in conflict with the above two standards should next be considered.

But there are also, it is submitted, certain irrevocable standards of the past, which even present opinion cannot exclude.

First among these are the forms of free government which were known to the Colonists, when they were permitted to exercise sovereignty. Any free forms practiced by the Colonists cannot be excluded from the category of "Republican forms."

The second irrevocable standard must include any form, which was recognized as Republican, when the Constitution was framed. So far as there was agreement upon fundamental principles, we must accept any forms which, within the fundamental

principles were comprehended in the extremes of opinion of that day. As Hamilton and Jefferson agreed that popular sovereignty must always be maintained, any "form" which was within the purview of the schools they represented must be accepted as "Republican."

Next in importance would seem to be the popular judgment in 1887.

Finally would come the secret statements in the Constitutional Convention.

These then are the standards of Construction, suggested, in the order of relative importance.

1st Present public opinion.
2d Congressional precedents.
3d Opinions of the courts.
4th Historic Democratic Forms.
5th Extremes in contemporaneous opinion.
6th Public opinion in 1887.
7th Statements in Constitutional Convention.

Hence consideration is asked to

B. *THE STANDARDS BY WHICH THE GUARANTY IS TO BE CONSTRUED.*

1. PRESENT PUBLIC OPINION.

The views above expressed as to the primary importance of present public opinion are the justification for the full statement made above (under I, B and C) of the present status of the Initiative and Referendum in the various States. It may be assumed that "whatever is" is at least intended to be Republican, as the standards of liberty have not been lowered in

the last century. This basis of construction is suggested by the expressions of Mr. Justice Holmes in his dissenting opinion in

Opinions of the Justices, 160 Mass. 587.

"— in construing the Constitution we should remember that it is a frame of government for men of opposite opinions and for the future, and therefore not hastily import into it our own views or unexpressed limitations derived merely from the practice of the past."

Thomas Jefferson said of Constitutional changes (Works, Vol. VII, p. 14):

"Forty years of experience in government is worth a century of book reading—

I know also that laws and institutions must go hand in hand with the progress of the human mind. As—manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times."

The sovereignty of the people found expression in Lincoln's first inaugural address:

"This country with its institutions belongs to the people who inhabit it."

In Martin *v* Hunter's Lessee, 1 Wheat. 327., the court says:

"It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter (U. S. Constitution), and restrictions and specifications which at the present, might seem salutary, might in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms."

Of all the terms used in the Constitution "Republican form of government" is the most general.

It swept into meaning and significance all the free forms of the past, the then existing conceptions, and the possible develop-

ments in free government for generations, perhaps centuries, to come. The term has, and was intended to have, infinite elasticity.

James Wilson of Pennsylvania, was the greatest Republican in the Constitutional Convention. As a Justice of this court he gave a definition of Republican government, which was good for that day and will remain good to the end of time:

"My short definition of such a government is one constructed on this principle, that the Supreme power lies in the body of the people."

Chisholm *v* Georgia, 2 Dall. 457.

Within this circle of popular sovereignty forms may revolve, cross, intertwine, shift, live and die. It excludes absolutely the idea that forms are confined to those which existed when the Constitution was framed.

Little was then known of popular government save in the memory of early colonial days, in the revolutionary fabrics of the States and the tottering Confederation.

The States had just formed their Constitutions, and free governments had not existed in the colonies since the Stuarts had committed them to the control of the privy council near the end of the 17th century. The only original conception which the revolution created was that of the sovereignty of the people. The framers of constitutions had fluctuated between royalty and Democracy: there were Hamiltons and Jeffersons. The republic was an experiment; doubts applied to every feature of the new forms. It was the uncertainty of infancy, which only age and experience could abate. To say that these experimenters with newly formed ideas were to determine for all time what constituted a republican form, would be to bind posterity to the crude notions of republican childhood.

When the secret ballot has been discovered as the true record of a nation's will must we be limited in its use to the

notions of our ancestors to whom the ballot was an untried tool?

Are the experiences of a simple colonial yeomanry to guage our armament against giant monopolies and legislative corruption?

The railroad, telegraph and telephone have multiplied a hundred fold the possibilities of Democratic co-operation.

The daily press and multitudinous magazines of to-day cannot take the same place in our horizon with the scattered pamphlets of the revolutionary period.

It would be a block in the way of human progress if this court should plant itself upon the conditions and conceptions of our forefathers in the constitutional conventions, and say to each of 46 sovereign States "Thus far shalt thou go and no farther."

The Constitution of Oregon embodies the progress and development of our institutions; it is the first working model of an ideal form in which "the supreme power lies in the body of the people."

2. CONGRESSIONAL PRECEDENTS.

Should this Court undertake to declare invalid the terms of the Oregon initiative amendment, there will be established two different standards of Republican government: one will have the sanction of the Congress and President, the other of this Court. Under its recognized power Congress has admitted Oklahoma to this Union and given its consent to the admission of Arizona.

These two States have in their Constitutions, almost in the same words, the initiative and referendum forms of Oregon. It is not a parallel, it is an essential identity. (See ex parte Wagner, 21 Ok. 35). It is submitted that such action of the political power is determinative of this case.

a. *ADMISSION OF OKLAHOMA.*

The enabling act of Congress for the admission of Oklahoma (U. S. S. at Large, Ch. 3335; Act June 16th, 1906).

§ 34—Provides for submission of the Constitution to the people. "And if the Constitution and government of said proposed State are Republican in form &c., it shall be the duty of the President of the United States"—to issue his Proclamation announcing the result of said election and thereupon the proposed State of Oklahoma shall be deemed admitted by Congress into the Union, &c.

The Congressional Record teems with attacks and defences of these Direct Legislation provisions and the decision of Congress was made deliberately in their favor. It is matter of notoriety that in the year following there was much doubt expressed as to the acceptance of the Constitution by President Roosevelt. Mr. Taft, then Secretary of War, was supposed to have been the representative of the President in addressing the people of Oklahoma and criticising the provisions for the Initiative and Referendum. That the people of Oklahoma had strong reasons to believe that their Constitutional provisions would meet with executive opposition, appears in the opinion of C. J. Williams in Ex parte Wagner, 21 Ok. 35.

The Court thus explains the history of the omission of the self-executing clause of the direct-legislation provisions in the Oregon Constitution.

"Such self-executing provisions were in the original form which was provided to be submitted to the people; but the convention reassembled "in order to obviate any possible objection that might be made by the President of the United States to the same, wherein it was required by §4, Art. IV, Constitution of the United States and the terms of the enabling act to be Republican in form, and not in conflict with the provisions of said act, that part was eliminated, leaving it to the legislature to

carry same into effect. Until the legislature created measures carrying it into effect, the Federal government had less right or reason to complain."

The decision was deliberately and finally made as follows:

By proclamation (U. S. St. at Large, Vol. 35, pt. 2, p. 2160), Nov. 16, 1907, President T. Roosevelt declared that the Constitution adopted by the people had been certified to him "And whereas it appears that the said Constitution and government of the proposed State of Oklahoma *are republican in form*, &c., and said Constitution" is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, &c. "the State of Oklahoma is to be deemed admitted by Congress into the Union under and by virtue of the said Act (June 16th, 1906) on an equal footing with the original States."

Signed "By the President, Elihu Root,
Secretary of State."

b. *ADMISSION OF ARIZONA.*

The enabling act for the admission of Arizona (U. S. S. at Large, Ch. 310, June 20, 1910) provided

§20.—"The Constitution shall be *Republican in form* and make no distinction in civil or political rights on account of race or color and shall not be repugnant to the Constitution of the United States and the *principles of the Declaration of Independence.*"

Congress provided for definite limitations upon the future powers of Constitutional amendment, "by an ordinance irrevocable without the consent of the United States and the people of said States" touching religious freedom, polygamous marriages, sale of liquor to Indians, disclaimers to public lands, equality of taxation, taxing Indian lands, assumption of territorial

debts, public schools, right of suffrage, &c.—which shall be made part of such Constitution in terms to preclude later amendment "without the consent of Congress."

It was open to Congress to make like reservation with respect to amendment striking out direct legislation, but it was not done.

By these reservations it appears also that this Constitutional contract with the U. S. was to be made with Congress, showing that the political power is recognized in the execution of such agreements.

The same act

§ 21 (Ch. 310, 1910) provides for submission of the Constitution proposed by the State convention to the people.

§ 22. "And if Congress and the President approve said Constitution the President shall certify said facts to the governor," &c.

§ 23. On election of State officers the President shall "issue his proclamation" and thereupon "the proposed State of Arizona shall be deemed admitted by Congress into the Union by virtue of this act on an equal footing with the other States."

The debates in Congress show that Congressional opposition to direct legislation had practically ceased.

It is public knowledge that the veto of the President was confined to the "recall" provisions of the Constitution and following this veto Congress amended the terms of admission by act approved Aug. 21st, 1911 so that "Arizona is admitted as a state upon amending the proposed Constitution (Art. VIII, § 1) adopted by the electors at the election held Feb. 9, 1911—so as to except members of the judiciary from the *recall* provision."

c. *THE REAPPORTIONMENT ACT.*

But an act of Congress of even greater significance has recognized the legal status of those State Constitutions, which contain provisions for direct action by the people under the Initiative and Referendum.

House Report No. 2983, 1911, provided for the redistricting of States for representation in Congress by customary legislative acts. This bill was amended in the Senate, Aug. 3d, 1911, and became a law in the following form (Acts Aug. 8th, 1911.)

"§34. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other representatives by the districts now prescribed by law until such State shall be *redistricted in the manner provided by the laws thereof*, &c."

This amendment was expressly intended to leave the redistricting subject to the Initiative and Referendum in States where they have been adopted.

Thus provisions for direct legislation have become a part of the political system of the United States, and the legality of future Congresses may be dependent upon a like recognition by this court.

3. OPINIONS OF THE COURTS.

This Court has in a sweeping statement confirmed the title of the people of Oregon to shape its government to their own free will:

"The powers of the States depend upon their own Constitutions: and the people of every State had the right to modify and restrain them, according to their own views of policy or principle."

Martin *v* Hunter's Lessee, 1 Wheat. 305.

The Supreme Courts of Oklahoma and Oregon have affirmed the validity of Direct Legislation in ex parte Wagner, 21 Ok. 35, and

Kadderly *v* Portland, 44 Oregon 118.

In the latter case Justice King for the Court erected an impregnable standard for the Republican form:

——"each republic may differ in its political system, or in the *political machinery* by which it moves, but so long as the ultimate control of its officials and affairs of State remains in its citizens it will in the eye of all republics, be recognized as a government of that class."

Kiernan *v* Portland, 111 Pac. Rep. 379.

So the Minnesota Supreme Court holds

"The test of Republican or Democratic government is the will of the people, expressed in majorities under the proper forms of law."

See also Hopkins *v* Duluth, 81 Minn. 189.
See also In re Pfahler, 150 Cal. 77.

Much reliance has been placed by opponents of direct legislation on the case of

Rice *v* Foster, 4 Harr. 479,

which contains language unworthy of an American Court and has very properly come under severe criticism.

Mr. Justice Holmes, in the opinions of the Justices, 160 Mass. 587, refers to the theory of Hobbes that the surrender of sovereignty by the people was final, and calls attention to the fact that the notion of Hobbes was urged in the interest of the absolute power of King Charles I., and thus disposes of the case of Rice *v* Foster:

"I notice that the case from which most of the reasoning against the power of the legislature has been taken by later decisions states that theory from language which almost is borrowed from the Leviathan."

4. HISTORIC DEMOCRATIC FORMS.

It must be that in using the general term "Republican Form of Government," it was intended to include beyond peradventure such preceding free forms as were known to the people of the States when they adopted the Constitution. Such indeed furnished the only basis upon which the people could construe the term. If such precedents were to be excluded the submission of the constitution to the people was in this regard a snare.

Hume, Rousseau, Locke and Kant had then spread the doctrine of popular sovereignty through the world, and their works and theories were well known to the colonists. Paine and Jefferson were expounders of this doctrine in America. Locke had attempted to put his theories into concrete form in the charter for Carolina. Rousseau's "Social Contract" was already imbedded in words in the Massachusetts Constitution. He had definitely challenged the representative system (Ch. XV.) in the words:

"Every law which the people in person have not ratified is invalid."

From these writers the Colonists had absorbed the extreme ideas of Democracy. Democracy flowed in their Teutonic blood, was imbedded in their town and colonial governments, and was the hope and inspiration of their revolutionary struggle.

"Representatives," "delegates," meant to them rulers and not servants. Their numerous democracies in the shape of towns had not in a century and a half yielded up even to the argument of force one jot of their purity. They exist to-day as lasting monuments of the truth, that the ultimate destiny of human freedom is pure Democracy, the direct expression of the popular will in the exercise of sovereignty.

Democracy, and not a representative system, was the ideal of the colonists.

A. *TEUTONIC ORIGINS.*

"The political instincts of a race have their origin in a prehistoric age." In their "force and persistence we discern—the tendency displayed in kindred nations to preserve in their governments the essential features of the primitive political institutions of the race to which they belong."

Stevens Sources of Const. of U. S., p. 3.

Nothing in history has proved its vitality more definitely than the Teutonic idea of direct popular government. It survived the Roman influences in Switzerland, and in England the Norman conquest. It is embedded in Magna Charta, in the English vestry and county, and on the new soil of America burst forth in its primitive purity and strength. Where this idea has held its force, freedom to-day appears in most perfect form; in Switzerland the volkmoot of Uri, Schwiz and Unterwalden has found expression in the Cantonal and Federal Constitutions; in England it is now asserting its dominion over feudal privileges in the deposal of the House of Lords and the destruction of land monopoly; in Australia and New Zealand popular government has taken on progressive forms, and Canada is advancing in like direction. In the United States it asserts itself over the mixed bloods and imported citizenship. As between the upper and the nether millstone it grinds all races into food for liberty, and now before this Court asks recognition of the final step in asserting the sovereignty of the people.

Back in the earliest records of Teutonic practices we find pure democracy, changed only in form of expression by the Constitution of Oregon.

Tacitus ("Manners of the Germans," § XI) describes the political gatherings of the ancient Teutons:

"No man dictates to the assembly; he may persuade but cannot command. When anything is advanced not agree-

able to the people, they reject it with a general murmur. If the proposition pleases, they brandish their javelins."

The historian McCracken (History of Switzerland, p. 35) expresses surprise "that it has escaped notice of historians that through Alamannian invasion of Helvetia and Great Britain by Saxon and English tribes, Switzerland and England (and her colonies!) have retained Teutonic institutions in greater purity than all the other States founded by Teutonic races."

"The first Swiss confederation entered history in 1291 when the small peasant communities, Uri, Schwiz and Unterwalden concluded a pact to defend themselves against the encroachments of the nobility." (McCracken, p. 6.)

These communities were pure democracies, and at the present day they retain the Landes gemeinde (popular assembly) as their legislative body, in form unchanged from the earliest days of their recorded history.

Kemble (Saxons in England, 236, 237) remarks:

"The Teutons certainly did not elect their representatives as we elect ours (in England) with full power to judge, decide for, and bind us, and therefore it was right and necessary that the laws, when made, should be duly ratified and accepted by all the people."

So—"The whole principle of Teutonic legislation is, and always was, that the law is made by the Constitution of the King and the consent of the people; and —one way in which that consent was obtained was by sending the capitula down into the provinces and shires and taking the 'wed' (pledge) —in the shire moot."

The original form of government in Saxon England was the Folksmoot (assembly of the people) and it was only under the stress of wars and the aggregation of the petty kingdoms or shires into the great heptarchic kingdoms, that the Folksmoot gave way to the Witangemot in the nation and survived only in the shires.

Kemble (Saxons in England, II, pp. 191–194) points out how impossible it was for the whole of a large people to attend upon the meetings, leaving their farms, while the leaders could easily do so, following the King. "Thus it appears to me by a natural process did the Folksmoot, or meeting of the nation become converted into a Witangemot or meeting of councillors."

History records the survival of democratic forms in England which filled the minds of the puritans, who left their native land and sought on inhospitable soil, the right to govern themselves according to their free will. They knew the parish had never ceased to be democratic: John Calvin had filled their minds with the doctrine of common consent, and the covenants of the people in England, Scotland and Ireland were the exemplars from which the Pilgrims formed their Mayflower compact of self-government. The Guilds were democratic in their form and administration, and the church congregations were miniature republics.

But these conditions in the mother country cannot be extended here.

Consult Kemble, Saxons in England; Stubbs, Constitutional History of England; Freeman, Growth of the English Constitution; Campbell (Douglas) Puritan in Holland, England and America; Hosmer, Anglo Saxon Freedom; Prof. Vincent, Government in Switzerland; Lowell, Governments and Parties in Continental Europe; Taylor, Constitutional History of England.

B. *COLONIAL PRECEDENTS.*

The Colonial Charters conferred in most instances Democratic powers. Even the proprietary governments had such form.

Carolina was invested with powers of government "with the assent, advice and approbation of the freemen of the Colony."

In Maryland's charter to Lord Baltimore a like provision was made, and later fundamental law gave power to the legislative assembly "as if the freemen were personally present."

William Penn was invested with powers of government "with the advice and assent of the freemen."

In the first year of the government devised by him "the general assembly was to consist of the whole number of freemen."

Pitkin's History of United States, pp. 57, 55, 56, 65, 16.

1. NEW HAMPSHIRE.

Albert S. Batchellor (Government and Laws before the Establishment of the Province) states that the grants to John Mason by the Council for New England (pp. 16, 17) included the towns of Exeter, Portsmouth and Dover, which were not only governed by direct vote of the people, but the first union of these towns (1637) under the name of "combination for local government," was upon the Democratic method (p. 23), and existed until the compact of union with Mass. Bay, 1641 (p. 23).

2. MASSACHUSETTS BAY.

The grant of the Council for New England of 1627–8, to John Endicott and five others was enlarged by the royal charter of 1629–30 to the Governor and Company of the Mass. Bay in New England."

The whole body of freemen was empowered to elect the officers and it was "by the general vote of the people and the erection of hands" that the law making power was (Oct. 19, 1630) first conferred upon the officers elected.

While the people of this Colony adopted the delegate system earlier than those of New Plymouth, the actions of the General Court were regulated upon purely Democratic lines until 1643 when the New England Confederation was formed.

The initiative of laws by a standing committee was provided in 1638 that their work might "bee psented to the Generall Court for confirmation or reiection, as the Court shall adjudge."

(Records of Mass. Bay, Shurtleff's Ed. page 22.)

Attendance of the freemen at the General Court was compulsory, but by enactment of the general court in 1635 (records of Mass. Bay, page 166) "the towns of Ipswch, Neweberry, Salem, Saugus, Waymothe and Hingham shall have libertie to stay soe many of their ffreemen att home, for their safety of the towne, as they judge needefull, & that the saide ffreemen that are appoyncted by the towne to stay att home shall have liberty for this Court to send their voices by pxy."

3. PLYMOUTH COLONY.

The Plymouth Compact was made Nov. 11, 1620, and is a covenant of Democracy:

"We—do—covenant and combine ourselves together into a civic body politick, for our better ordering and preservation and furtherance of the ends aforesaid: and by virtue hereof, do enact, constitute and frame such just and equal laws, ordinances, acts, constitutions and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony; into which we promise all due submission and obedience." Signed by 41.

The Compact, Charter and Laws of the Colony of New Plymouth (1836), p. 19.

The first laws of the Colony of New Plymouth were made in 1623 (p. 28) in full court (p. 29).

The act of January, 1632 begins: "It was enacted by public consent of the freemen of this society of New Plymouth, etc." (p. 30).

A form of government adopted Nov. 15, 1636, recited that "No imposicon law or ordnance be made or imposed upon or by ourselves or others at present or to come but such as shall be made or imposed by consent according to the free liberties of the State and Kingdome of England and no otherwise" (p. 36). The election of governor and seven assistants was "to be made only by the freemen according to the former custome" (p. 37). As to laws "that the lawes and ordnances of the Colony and for

the government of the same be made onely by the freemen of the corporation and no other" (p. 42).

It was at a general meeting of freemen that in 1638 (p. 63) it was enacted as follows:

"Whereas complaint was made that the freemen were put to many inconveniences and great expences by their continuall attendance at the Courts, it is therefore enacted by the Court for the ease of the severall Colonies and Townes within the government, That every Towne shall make choyce of two of their freemen and the town of Plymouth of foure, to be Committees or deputies to joyne with the Bench to enact and make all such lawes and ordinances as shall be judged to be good and wholesome for the whole, provided that the lawes they doe enact shall be propounded one Court to be considered upon till the next Court, and then to be confirmed, if they shal be approved of *except the case require present confirmacon*. And if any act shall be confirmed by the Bench and Committees which upon further deliberacon shall prove prejudiciall to the whole, That the freemen at the next Eleccon Court after meeting together *may repeale the same and enact any other usefull for the whole*." (Here is emergency legislation and the referendum and initiative retained in the body of the freemen).

In 1646 it was Enacted by the Court:

"Whereas the Townes formerly were to send their deputies (which must arise out of their freemen) to attend the three Generall Courts of the yeare, for our Soveraigne Lord the Kinge, now upon the speciall complainte of the deputies of the Townes so sent professinge them to be oppressed thereby, it is ordered and enacted that the whole body of freemen appeare at the Election Courte, which is the first Tuesday in June successively, and there to make or repeale such lawes orders and ordinances as shall be founde meete and wholesome for the orderinge of the government, and that then alsoe they present such deputies as have bene chosen by their townes accordinge to order formerly established who are to attend the same, and its severall

adjournments as the occasions of the Country shall require, and that whatsoever lawes orders and ordinances shall be made or repealed be at that Courte and the severall adjournments thereof onely done and the other Courts to attend onely matters of Judicature and the magistrates onely to attend the same." p. 88.

Apparently the delegation of legislative powers had proved unsatisfactory and thereupon such powers were withdrawn from the deputy courts and the enactment of laws was restored exclusively to the whole body of the freemen at the election Court in June. The first experiment in delegation of legislation was a failure.

1658 the laws of the Colony were revised and published. The revision begins (p. 107):

"Wee the Associates of New Plymouth coming hither as freeborne subjects of the state of England indowed with all and singulare the privilidges belonging to such being assembled doe ordaine constitute and enacte that noe acte imposition law or ordinance bee made or imposed upon us att prsent or to come but such as shal bee made and imposed by consent of the body of the Associates or theire Representatives legally assembled, which is according to the free libertie of the State of England."

The same clause was enacted in general laws 1671 (p. 241)

4. RHODE ISLAND.

The early life of the colonists of Rhode Island was under a pure democracy. The colonists of Providence in 1636 (records of the Colony of Rhode Island, Vol. 1, page 14) declared their obedience "to all such orders or agreements as shall be made for public good of the body in an orderly way by the major consent of the present inhabitants, masters of families incorporated together in a towne fellowship and others whom they shall admit unto them only in civil things."

The town of Portsmouth in 1638 by compact underwritten by the inhabitants (records of the Colony of Rhode Island,

Vol. 1, page 52) submitted themselves "to the King of Kings and Lord of Lords and to all those perfect and most absolute lawes of his given us in his holy word of truth, to be guided and judged thereby."

Not only were the freemen of Portsmouth the makers of the laws but (Records of the Colony of Rhode Island, Vol. 1, 57) penalties were imposed upon those who "shall not repair to the publick meetings to treate upon the publick affairs of the Body upon publick warning (Whether by beate of the Drumm or otherwise) if they fayle one quarter of an houre after the second sound, they shall forfeit twelve pence; or if they depart without leave they are to forfeit the same summ of twelve pence."

Not only did the towns of Rhode Island thus independently practice a democratic system but a general court, legislated for the united towns of Newport and Portsmouth and in 1641 (Records of the Colony of Rhode Island, Vol. 1, page 112) a democracy was declared in the following words:

"It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island, and the Jurisdiction thereof, in favor of our Prince, is a *Democracie* or Popular Government; that is to say, It is in the Powre of the Body of Freemen, orderly assembled or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man."

Thus we have independent compact of the towns united in a purely democratic system recognizing only laws made by themselves based upon "the holy word of truth."

Not until 1643 (Records of the Colony of Rhode Island, Vol. 1, 143) was the charter of the Colony of Rhode Island granted bearing the name of "The Incorporation of Providence Plantations in the Narragansett Bay in New England."

This was a democratic charter giving to the inhabitants (Records of the Colony of Rhode Island, Vol. 1, p. 146) "full power and authority to rule themselves, and such others as shall hereafter inhabit within any part of the said tract of land by such a form of Civil Government *as by voluntary consent of all, or the greater part of them*, they shall find most suitable to their estate and condition."

Under the terms of this instrument, the people of Providence, Newport, Warwick and Portsmouth met in "general court" in May 19th, 1647. They proceeded to enact a perfect form of the initiative and referendum in the following remarkable terms (Records of the Colony of Rhode Island, Vol. 1, 148, 149).

"II. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the Townes, Vigd't, That is when a case is propounded . . . The Towne where it is propounded shall agitate and fully disscus the matter in their Towne Meetings and conclude by Vote; and then shall the Recorder of the Towne, or Towne Clerke, send a coppy of the agreement to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the Colonie concurring in the case, it shall stand for a Law till the next Generall Assembly of all the people, then and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the Committee premised, and to be freely chosen. And further it is agreed, that when the General Courte thus assembled shall determine the cases before hand thus presented. It shall also be lawful for the said General Court, and hereby are they authorized, that if unto them or any of them some case or cases shall be presented that may be deemed necessary for the public weale and good of the whole, they shall fully debate,

discuss and determine ye matter among themselves; and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and concluding the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the vote: and if the major vote determine the case, it shall stand as a Law till the next General Assemblie then or there to be confirmed or nullified."

Historians (see remarks of Amasa M. Eaton, Harvard Law Review, XIII, 584, Arnold, History of Rhode Island, Vol. 1, pp. 203–204) regard this act as a genuine instance of the popular initiative and referendum.

In 1650 the general court gave its powers to a representative committee consisting of 6 from each town, (Records of the Colony of Rhode Island, Vol. 1, pp. 228, 229) and provided for the popular ratification of laws enacted by such committee by the sending of the same to the towns taking their vote thereon which, if unfavorable, should nullify such laws. This was the compulsory referendum in its purest form.

A similar referendum appears in (Records of the Colony of Rhode Island, Vol. 1, pp. 401, 402) and by later provision of the general court, (Records of the Colony of Rhode Island, Vol. 1, page 429,) the majority votes of the entire colony were required for the approval or disapproval of the law instead of the majority of those in each town.

In 1760, the Colony of Rhode Island was a pure democracy in the ancient form of a Folkmoot in which all the public freemen voted.

5. CONNECTICUT.

The settlement of Connecticut was occasioned by the dissatisfaction of certain colonists with their share in the government of the colony of Massachusetts Bay and in 1636 the inhabitants of three towns, (Johnston, History of Connecticut,

pp. 24, 25) migrated in order that they might enjoy a larger liberty in civil affairs.

(See Lobingier, The People's Law, McMillan, 1909 which work contains a comprehensive and able analysis of the democratic institutions of the United States.)

It has been claimed by the historian, Alexander Johnston that "the birthplace of American Democracy is Hartford," (Johnston's Conn. preface p. VIII).

Three years after their settlement, the inhabitants of Windsor, Wetherford and Hartford met in mass convention and formed "one Publike State or Comonwelth". (Colonial Records of Conn. Trumbull's Ed. p. 21).

The agreement is known as the "Fundamental Orders" of 1639. It has been called and is perhaps entitled to be called the first written constitution known in history and is certainly the first which represents the idea of the sovereignty of the people.

Lobingier, p. 90.
Fiske, Civil Government, 192
Johnston, Conn. 63.

The instrument was adopted by the entire body of the freemen and no longer contained any appeal to the sovereign in its enacting clause, but was a direct announcement from the people, "it is ordered, sentenced and decreed."

This instrument had been previously prepared and was adopted as prepared and therefore contains the two essentials of modern constitution making, namely, the preparation of a draft and the popular ratification. Likewise when this instrument was amended, the ratification by the people was required. (Colonial Records of Conn., Vol. 1, p. 140 and 347).

6. THE TOWNSHIPS.

From the landing of the Pilgrims to the time of the Constitutional convention, the town meeting was the unit of popular action in New England. It was the purest form of Democracy,

and was never abandoned except when larger growth compelled a delegate form for cities. The Colonies were obliged to yield to this necessity, but their constituent towns were enduring democracies. Plymouth town has not for a year yielded up this form and the same is true of all other towns to this day. When the Constitution was framed the towns elected the delegates to the ratifying conventions and in numerous cases instructed them as to their action. Lobingier, Peoples Law, p. 188 and 189.

Many towns framed amendments upon which their delegates were to insist.

The towns of New England were as distinct entities within their colonies and States, as were the States under the Confederation and Constitution.

The Stuart ministries were able to impose their governors upon the Colonies as Federalized governments, but as has been well stated the latter "in respect to their municipal rights and privileges were so strongly intrenched in the New England town system that they were practically impregnable." Batchellor, Government and Laws of New Hampshire, p. 36.

From the date of the new Charter (1671) to the Declaration of Independence the law-making power of the Colonies was limited, and the only autonomy was in the towns. As revolutionary States the Colonies of New England were aggregated towns, pure democracies, the real seat of government.

In Massachusetts the Township has always been a political unit, endowed with legislative powers.

By act of the general court of Massachusetts Bay, 1636, it was ordered that "the freemen of every town or a major portion of them . . . make such laws and constitutions as concern the welfare of their town . . . not of a criminal but of a prudential nature."

The call for the convention to frame the Constitution of Massachusetts was issued upon returns from the towns demanding a convention; the towns were requested to send dele-

gates and such constitution was not to be promulgated until the instrument was laid before the "respective towns and plantations" for approval or disapproval by two-thirds of the citizens. Journal of Convention, p. 5, 1779.

The Democratic towns thus took the initiative in the framing of the constitution and held control through the right of ratification.

Such were the Democratic institutions which were cherished in the memory of the Colonists.

When they by violence shook off the Soveignty of the King these were the traditional forms. It is inconceivable that in forming their States and a National Constitution these were not the most precious shapes of government, which they contemplated and which they wished to perpetuate in their exercise of sovereign power.

5. EXTREMES IN CONTEMPORANEOUS OPINION.

The importance of public opinion in the construction of the National Constitution is apparent when we consider that Alexander Hamilton took but small part in the Constitutional Convention, and Jefferson was not a member. Samuel Adams, John Adams, Patrick Henry and other great patriots were not in the convention.

It was indeed in the debates on ratification and in contemporaneous discussions that the real test of popular opinion is to be found. Jefferson and Adams objected that the rights of the people had not been sufficiently guarded, and the ten articles of amendment served as a rebuke to the indifference of the National Convention as to fundamental popular rights.

The two great men, who were then and are now recognized as the leaders of the two extremes of political opinion, were Hamilton and Jefferson, Federalist and Republican.

They agreed as to one fundamental proposition, viz.: that popular sovereighty was the basis of free government. In

sympathies Hamilton was a monarchist, but he acknowledged the principles of the Declaration of Independence.

As to the question of the Republican form there was a wide divergence between Hamilton and Jefferson, but it is submitted that they fully represented the current extremes of opinion among the citizens who ratified the Constitution.

Their extreme interpretations of "republican form" may be accepted as including the entire contemporaneous interpretation, and no form between these extremes should be excluded in the present construction of the "republican form" which was guaranteed to the States.

Hamilton declared that "as long as offices are open to all men and no constitutional rank is established, it is pure republicanism." (Works, Vol. 2, page 416).

Also, "after all we must submit to this idea, that the true principle of the Republic is that the people should choose whom they please to govern them; representation is imperfect in proportion as the current of popular favor is checked." (Works, Vol. 2, page 44).

Hamilton went so far as to declare, "A reunion with Great Britain not impossible with the son of the present monarch in supreme government of this country." (Works, Vol. 2, page 421).

His conception of a republic was contained in the plan which he had prepared for the constitutional convention. (Works, Vol. 2, page 407; Elliot's Debates, Vol. 5, page 584.

This plan provided that the Governor of each State should be appointed under the authority of the United States, and that he should have the right to negative all laws about to be passed in the State. He proposed a Senate selected by electors of the several States who must be free-holders and should hold their offices during good behavior. The President was to be selected by electors chosen by free-holding citizens of each State and he should hold his office during good behavior. The justices of the Supreme Court were to hold by like tenure

together with all other judges. The House of Assembly contained the only officials who, according to his plan, had less than a life tenure based upon good behavior. He provided for the power of impeachment and regarded this, together with the original consent of the people to their constitution, as providing a complete basis of popular sovereignty.

Jefferson's conception of a republic is contained in his letter to John Taylor of May 28th, 1816. (Works, Vol. 6, page 605).

"The term *republic* is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland.

Were I to assign to this term a precise and definite idea, I would say purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority, and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of its citizens.

Such a government is evidently restrained to very narrow limits of space and population. I doubt if it would be practicable beyond the extent of a New England township. The *first shade from this pure element*, which, like pure vital air, cannot sustain life of itself, would be where the powers of the government, being divided, should be exercised each by representatives chosen either *pro hac vice*, or for such short terms as should render secure the duty of expressing the will of their constituents. This I should consider as the *nearest approach* to a pure republic, which is practicable on a large scale of country or population.

The further the *departure from direct and constant control by the citizens*, the less has the government of the ingredient of republicanism."

Hamilton would have accepted a monarch, and while he accepted also popular government as a necessity, he described

it as "but pork still with a little change of sauce." Jefferson detested monarchy, insisted upon pure democratic forms as ideal, and regarded even representatives as "a shade from the pure element."

Hamilton's conceptions prevailed in the Constitutional convention, and since his time popular efforts have been directed to the amendment of his system.

Jefferson's "republican form" is at last realized under the machinery of the modern republic, in the Oregon Constition, which is before this court for judgment.

It is a living, breathing ideal, pitted against a decaying device.

6. PUBLIC OPINION IN 1787.

Madison in Federalist, Letter 43, explains the purpose of the guaranty clause and says "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter."

Not to burden this presentation with citations which relate to current opinion at the adoption of the Constitution, one resolve is submitted which is monumental in its character and spoke the unanimous judgment of Massachusetts in the definition of free government.

"Resolved, unanimously, that the government, to be framed by this convention shall be a FREE REPUBLIC."

"Resolved it is of the Essence of a free Republic, that the people be governed by fixed laws of their own making."

Such was the preliminary declaration of the framers of the Massachusetts Constitution in convention assembled. Journal of the Convention, p. 24, Sept. 3d, 1779.

In this convention were James Bowdoin, President; Samuel Adams, John Hancock, Oliver Wendell, John Lowell, John Adams, John Pickering, Theophilus Parsons, Samuel Phillips, Jr. George Cabot, Capt. Chas. Sergeant, Nathaniel Gorham, Joseph

Allen, Gen. Jonathan Warner, Caleb Strong, John Cotton, William Cushing, Robert Treat Paine, David Sewall, James Sullivan, afterwards Attorney-General, many of whom are immortals in American history, and most of whom were as capable of defining the term "free republic," as any citizens of the new republics of America.

This definition of a free republic by the Massachusetts Constitutional Convention of 1779 has a parallel in the extemporaneous definition given by Governor Randolph in the Virginian Convention for the ratification of the United States Constitution.

"The empire of government of laws—is that in which the laws are made with the free will of the people: Hence, then, if laws be made by the assent of the people, the government may be deemed free." Elliot's Debates, Vol. 3, p. 34.

7. STATEMENTS IN CONSTITUTIONAL CONVENTION

The meaning of the term "republican form" was not debated in the convention, so as to define the views of the members, saving such utterances as will be found later under the heading of "Sovereignty."

The only form submitted which may have value is that of Randolph at a later stage of the convention, who made the following proposition to meet the wishes of the small states.

"III—That the people of each State ought to retain the perfect right of adopting, from time to time, *such forms of republican government as to them may seem best* and of making all laws not contrary to the articles of Union; subject to the supremacy of the general government in those instances only in which that supremacy shall be expressly declared by the articles of the Union."

Nowhere in Constitutional debates is an excess of power reserved to the people themselves even hinted at as unre-

publican. Some distrust of popular government was expressed by Gerry and others, but there was no suggestion of curbing these powers in the States.

IV. What Is "Republican Form?"

A. *NO FIXED STANDARD OF REPUBLICAN FORM.*

1. IN THE STATES.

Within the limits of the free exercise of the sovereign power of the people, there was no essential form fixed in the minds of the framers of the Constitution.

The separation of the three departments of government was not a vital feature of the new States formed from the colonies. It has been held by this Court that a legislature may exercise judicial functions.

Satterlee v. Matthewson, 2 Peters, 413.

It was not essential that executive power or judicial functions should be vested in separate bodies. New Hampshire had no governor but a mere president appointed by the Council. Says Bancroft, "Here is a government without an executive which merged the executive power in the two branches of the legislature and made no provision for courts." (History of U. S., Vol. 8, page 243).

John Adams made strenuous objection to the creation of legislatures in a single body yet such was the form of the Pennsylvania Constitution.

John Adams' Works, Vol. 4, page 202.

Most of the States gave the veto power to the governor, yet Virginia withheld it "warned by its royal misuse."

Life tenure for judges was not universal; by the New Jersey Constitution, judges were appointed by the legislature for 5 and 7 years. The length of official tenure was not regarded as vital

even though John Adams pronounced that there was not "in the whole circle of the sciences a maxim more infallible than this: 'where annual elections end, there slavery begins.'"

2. FORMS VARIABLE AND ELUSIVE.

There is some significance in the limitations of the guaranty to the "form" of a republic. It is doubtful if anything can be challenged but the form, and it might well have been considered that with the proper forms the people would see to their proper execution, and if they did not it should be no concern of the United States. Were this not so, the most trifling occasions and technicalities might be availed of to call the central power to interfere with State administrations.

Mexico was undoubtedly Republican in form under Diaz, but the forms were perverted to a dictatorship; yet a mere show of revolution restored the people to their use of the duly provided forms. Such self-corrective power of State autonomy was doubtless relied upon when the form alone of Republican government was required of the States. Of such form the only test is the character of the general fabric.

Our experience with the Constitution of the United States has witnessed the practical nullification of many of the forms which were provided. The electoral college is non-existent as an independent body; the power of the President's cabinet is extra-constitutional; the senatorial power to consent to official appointments has become practically the control of such appointments.

Woodrow Wilson insists (Congressional Government, page 306) that the Constitution "is now our form of government rather in name than in reality, the form of the Constitution being one of nicely adjusted ideal balances, whilst the actual form of our present government is simply a scheme of congressional supremacy."

In England the Premier has boldly declared that "the King's veto is as dead as Queen Anne," and the recent concession by the

House of Lords of a vast portion of this power is a mighty change in substance without a change in form.

It was Lord Butler who well said, "The forms of a free and the ends of an arbitrary government are things not altogether incompatible."

John Adams in his "Thoughts on Government" (Works, Vol. 1, page 193) rebuked the poet Pope for false philosophy expressed in his lines, "For forms of government let fools contest; that which is best administered is best." "Nothing," said Adams, "can be more fallacious than this; nothing is more certain than that some forms of government are better fitted for being well administered than others."

The later provisions of Article 4, Section 4 for cases of invasion and domestic violence are very impressive in their suggestion that the substance of republicanism is to be preserved under that portion of the article, and that under the guaranty clause, the States are required only to furnish the *forms* of a free republic.

It is quite apparent that there are no particular forms contemplated as Republican by the Constitution.

"In the Constitution of Pennsylvania the executive department exercises judicial powers in the trial of public officers.—In New Jersey, in Georgia, in South Carolina and North Carolina the executive power is blended with the legislative."

James Wilson in Elliot's Debates, Vol. II, p. 505.

Clearly the direct election of representatives is not a requisite, as this very Court consists of men appointed by the President who is elected by an electoral college. It is likewise plain that a limited tenure is not essential as the members of this Court hold their offices during good behavior.

In the Constitutional period the selection of judges was not by the people but in the form of appointment under the English precedents. That the people of most of the States have decided to elect their judges constitutes clearly no invasion of

the republican form. If it be true that the only basic requisite of republican form be its recognition of the continuing sovereignty of the people, such form would seem to relate to the machinery of the government; the shape it takes must be such that the popular will shall be in all parts operative or shall always permit expression of consent of the governed.

Pure Democracy has never been regarded as inconsistent with such form, but on the contrary has been deemed its most perfect form.

Oligarchy and monarchy are the only inconsistent forms, namely, the power of one or of less than a majority to determine the rights of the whole.

There is no doubt that the speech of James Wilson in the Convention of Pennsylvania for the Ratification of the Constitution, November 24th, 1787 exercised a profound influence upon the public opinion with respect to the Federal Constitution.

B. *"DEMOCRATIC" AND "REPUBLICAN" SYNONYMOUS.*

It is apparent from the discussions of the Constitutional period that no distinction existed in the larger conception of the words "democracy" and "republic." This is true even of ancient authorities.

"There are three sorts of public government, to wit: Monarchy, which is regality or kingship, Oligarchy, which is the government by peers and nobles and Democracy, which is a popular or (as we term it) a free State."

Plutarch's Morals, Vol. V, p. 396.
Tacitus' Annals, Book IV, Ch. 33.

"If we consider the nature of civic government, we shall find that, in all nations, the supreme authority is vested either in the people, or the nobles or a single ruler."

Charles Pinckney a member of the Constitutional Convention quotes Paley, Vol. II, 174, 175, who enumerates three forms of government, Despotism, Aristocracy, and a Republic and defines the latter as "a republic, where the people at large EITHER COLLECTIVELY OR BY REPRESENTATION form the legislature." Elliot's Debates, Vol. IV, p. 328.

Hamilton in his brief for argument on the Constitution of the United States (1788, Works, Vol. II, p. 463) makes it plain that "republic" was a term variously understood. He asserts that it has been applied to aristocracies and monarchies as Rome and Great Britain under kings, Sparta and Carthage through a *senate for life*, Netherlands through aristocracy and monarchy.

He adverts to the confusion about the words Democracy, Aristocracy and Monarchy, designating Democracy, as defined by Rousseau, as a government exercised by the collective body of the people and any delegation creating an aristocracy. But he says:

"Democracy in my sense where the *whole power of the government in the people;* 1, whether exercised by themselves or, 2, by their representatives, chosen by them either mediately or immediately and legally accountable to them."

He divides governments not into Republics &c., but into Democracy, Aristocracy, Monarchy, and defines *Aristocracy*—"Where whole sovereignty is permanently in the hands of a few for life or hereditary" and *Monarchy*—where whole sovereignty is in the hands of one man for life or hereditary."

The "consequence" is that the United States Government is a "representative *Democracy.*"

John Marshall in Virginia Debates on Constitution, (Elliot's Debates, Volume 3, page 222) deals with the United States Constitution as creating a "Democracy."

"I conceive that the object of the discussion now before us is whether Democracy or despotism be most eligible. I am

sure that those who framed the system submitted to our investigation, and those who now support it intend the establishment and security of the former.

"We, sir, idolize the Democracy; those who oppose it have bestowed elogiums on monarchy. We prefer this system to any monarchy, because we are convinced that it has a greater tendency to secure our liberty and promote our happiness. We admire it because we think it a well-regulated Democracy. It is recommended to the good people of this country; they are through us to declare whether it be such a plan of government as will establish and secure their freedom."

"Switzerland," that confederate republic, has stood upwards of 400 years; and although several of the individual republics are democratic and the rest aristocratic, no evil has resulted from this dissimilarity." Patrick Henry, in Virginia Debates, Elliot's Debates, Vol. IV, p. 62, and at p. 44,—"Holland is not a Democracy wherein the people retain all their rights securely."

James Wilson said (Elliot's Debates Vol. II, page 365) "then let us examine, Mr. President, the three species of simple governments which are . . . the monarchial, aristocratical and democratical."

C. *THE REPRESENTATIVE SYSTEM.*

1. A NECESSITY: NOT A PRINCIPLE.

Historians are agreed that where Democratic forms have prevailed they have yielded to representative or delegate forms only from the necessities arising from extension of population and territory. It has been pointed out (*supra* III, B. 4, a.) that this was true of the Teutonic institutions of England.

Concerning the Plymouth Colony, "The government was first a pure democracy; the whole body of the people often met and divided upon affairs both executive and legislative. As their numbers increased, this was found inconvenient;

and in 1639 a House of Representatives was established, and Representatives elected from the several towns."

Pitkin's History United States, p. 34.

Bancroft's History of United States, Vol. VIII, p. 370, says:

"The Republics of the ancient world had grown out of cities, so that their governments were originally municipalities; *to make a republic possible in the large territories* embraced in the several American Colonies *where the whole society could never be assembled*, power was to be deputed by the many to the few, who were to be elected by suffrage, and were in theory to be a faithful miniature portrait of the people."

The Charter of "the Governor and Company of Massachusetts Bay, granted 1629 by Charles I, provided that

"The freemen of the company were to hold a meeting four times a year; and they were empowered to choose a governor, etc.:"

"After their arrival in Massachusetts, their numbers increased so rapidly that it became impossible to have a primary assembly of all the freemen, and so a representative assembly was devised after the model of the Old English County Court."

John Fiske's "Civil Government in the United States," pp. 161, 162. (Cambridge Press Edition, 1902).

"As a Republican, sir, I think that the security of the liberty and happiness of the people from the highest to the lowest, being the object of government, the people are consequently the fountain of all power. They must, however, delegate it to agents because from their number, dispersed situation and many other circumstances, they cannot exercise it in person."

Edmund Pendleton, Elliot's Debates, Vol. 3, 298.

Mr. Wilson, a Swiss Official, says of the Initiative and Referendum in Switzerland that

"They have given back to the people the right they once possessed to take part in the legislation of their respective Cantons. The right was surrendered when the people *became too numerous* to assemble together for law-making, and so representatives were chosen to make the laws."

The conception of a general assembly of the State is involved in the address of the Massachusetts "Convention for framing a new Constitution of government"—to their constituents, March 2, 1780.

"Could the *whole* body of the people have convened for the same purpose, there might have been equal reason to conclude that a perfect unanimity of sentiments would have been an object not to be obtained."

Journal of Mass. Convention Appx., p. 216.

John Adams in Thoughts on Government, Vol. IV, p. 194, says:

"As good government is an empire of laws, how shall your laws be made? *In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws.* The first step, then, is to depute power from the many to a few of the most-wise and good," and at p. 195—"This representative assembly—should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

2. PHILOSOPHY OF REPRESENTATIVE SYSTEM.

The conception that the principle of representation somehow qualifies the sovereignty of the people suggests the German adage!

"Wo die Begriffe fehlen, da stellt zu rechter Zeit ein *Wort* sich ein."

(When comprehension fails, a *word* happens opportunely in.)

It is true in the larger sense that the whole government must represent the popular will, but it is not true that all its functions

must be performed through delegates. It suffices if the things done "represent the will of the majority of the people" and this is the length and breadth of the representative system in a Republican government. The manner in which this is accomplished is merely functional and in no sense fundamental.

It does not need argument or citations to prove that our governments are and must be affected by the representative principle and practice. The error of the appellant in his claims is in assuming that legislation *must* under the Republican principle take the form of a delegated power. The various expressions indicating that some kinds of representation are necessary are essentially true because all acts of government cannot be performed by the mass. Even in the forum of Rome, there were senators, tribunes, praetors and ædiles. In the town meeting, the present form of democracy, sit the selectmen, assessors, town clerk, constables and other representatives of the people of the town in the execution of their behests. There sits the justice of the peace, their agent or representative to perform the judicial functions. Clearly the citizens in mass cannot pay bills, assess and collect taxes, keep the records and make arrests.

A democracy without agents and representatives is inconceivable. In the executive functions, the representative system is physically essential to a pure democracy.

The judicial functions might be exercised directly by judgments and decrees settled in mass, but the service and execution must be delegated to certain persons.

But the legislative or law-making power may be physically exercised without the intervention of agents or the power may be delegated to agents who are called "representatives," because they in theory carry out the will of the electorate. Hence representative legislation is the exercise of the people's sovereignty, not by virtue of any sovereign power inherent in the persons who represent, but purely by virtue of the sovereignty imparted to them by the people.

There is no legal or constitutional principle which warrants the claim that when the people decline to delegate their sovereignty, the republic fails.

Representation so far as it is a necessity must exist, but the necessity is limited and variable, and between its maximum and minimum is no line which marks the Republican boundaries.

Legislators may be dispensed with and the popular will remain in full power. A legislature is no more essential to a Republican form, than agents are essential to a business. They may be functionally necessary, but do not inhere in the business.

James Wilson (Elliot's Debates, Vol. II, page 358) says that even in England, "though we find representation operating as a check it cannot be considered as a prevailing principle."

3. POWER OF LEGISLATURES DELEGATED AND LIMITED.

a. *DELEGATED POWER.*

The legislature is a pure creature of the State. While it is necessary to make laws, it is not necessary to have legislatures. If the people choose they may cease to create, and the creature will cease to exist.

The status of legislatures is already well established in the decisions of this court. In

Van Horn's Lessee *v* Dorrance, 2 Dall. 304,

Mr. Justice Patterson describes the source and extent of legislative power.

"The Constitution of England is at the mercy of Parliament. Every act of Parliament is transcendant and must be obeyed."

In America "a constitution is the form of government *delineated by the mighty hand of the people*, in which certain first principles of fundamental law are established. It contains the permanent will of the people and is the Supreme *law* of the land; it is paramount *to the power of the legislature*, etc.—The legisla-

tures are *creatures* of the *constitution:* they owe their existence to the constitution, they derive their powers from the constitution. The *constitution* is the work or will of the people themselves in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes *limits to the exercise of the legislative authority, and prescribes* the orbit in which it must move."

Calder *v* Bull, 3 Dall. 386, states:

"It is a self-evident proposition that the several State legislatures retain all the *powers of legislation delegated to them by the State constitutions*, etc."

Fletcher *v* Peck, 6 Cranch 87, says:

"One legislature is competent to repeal any general act, which a former legislature was competent to pass, and one legislature cannot abridge the powers of a succeeding legislature."

Hamilton (Works, Vol. 2, page 322) recognized the exact limits of legislative power.

"Happily for this country the position is not to be controverted that the Constitution is the creature of the people; but it does not follow that they are not bound by it, while they suffer it to continue in force; nor does it follow that the legislature which is, on the other hand, a *creature of the Constitution*, can depart from it on any presumption of the contrary sense of the people. *All the authority of the legislature is delegated to them* under the Constitution; their rights and powers are there defined."

James Wilson (Elliot's Debates, Vol. II, p. 446) says:

"The supreme power resides in the people—They can delegate it in such proportions to such bodies, on such terms, and under such limitations as they think proper."

Story, (Comm. 1, Section 628) commenting upon the fact that the new confederation which had been created by the legislatures of the States really had no Constitutional authority, remarks. "If the State in its political capacity had it (the right) it would not follow that the legislature possessed it; that must depend upon the powers confided to the State legislature by its own Constitution; a State and the legislature of a State are quite different political beings."

b. *LIMITED POWER; INSTRUCTION AND RECALL.*

These powers of sovereign control over legislators have been recognized since representative government began in this country.

The Body Liberties of Massachusetts Bay Colony, 1641, No. 67, declares:

"It is the constant libertie of the freemen of this plantation to choose yearly at the court of election out of the freemen all the general officers of this jurisdiction. If they please to discharge them at the day of election, by way of vote they may do it without showing cause, but if at any other general court, we hould it due justice that the reasons thereof be alleadged and proved." From laws of New Hampshire, Volume 1, page 759.

The Articles of Confederation (March, 1781) recited:

"For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct to meet in Congress on the first Monday in November of every year, *with a power reserved to each State to recall* its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year."

The original form of Constitution introduced by Randolph in the Constitutional Convention provided for a House of Rep-

resentatives elected by the people "and to be subject to recall." Apparently this provision dropped out of the later forms without discussion.

The instances of instructions to delegates in the Colonies are too numerous to recite.

The Boston town meetings had frequently instructed their representatives, though they were such men, for instance, in 1768, as James Otis, Samuel Adams, John Hancock, and Thomas Cushing, and did so in 1764, '65, '67, '68, '69, '70, '72, and '74.

The town meeting in Boston in May, 1764, after electing four representatives, proceeded to instruct them as follows: "By this choice, we, the free-holders of the town, have delegated you the power of acting in our public concerns, in general, as your prudence shall direct you; *reserving to ourselves the Constitutional right of expressing our minds and giving you such instructions upon important subjects, as at any time we may judge proper,*" and then proceeded, through John Adams, who acted as spokesman, to lay down the principles of self-government in opposition to the claims of the British Parliament.

It has been well stated that

"This Constitutional Right of expressing their minds and giving instructions inevitably resulted from the fact that in both Boston and New Plymouth all freemen had originally a personal voice in the transaction of public business at the General Courts." (History of Elections in the American Colonies, by C. F. Bishop.)

D. *"SOVEREIGNTY" THE ONLY TEST OF FORM.*

1. WHAT IS SOVEREIGNTY?

"Sovereignty is the right to govern."

"Our governors are the agents of the people and at most stand in the same relation to their sovereigns in which regents

in Europe stand to their sovereigns." Justice Wilson in Chisholm *vs.* Georgia, 2 Dall. 470.

Sovereignty necessarily implies supremacy; it is indivisible, indefeasible and inalienable, though it may be delegated. Jameson Constitutions, p. 20.

"There can be no subordinate sovereignty"—

"There cannot be two sovereign powers on the same subject."

James Wilson in Elliot's Debates, Vol. II. pp. 443, 456.

Hamilton has well said in the Constitutional Convention (Elliot's Debates, Vol. V, page 202) "two sovereigns can not co-exist within the same limits."

This principle makes it impossible that the sovereignty of the people should co-exist with the sovereignty of the legislature.

If a legislature be sovereign it must have final power to make laws; possessed of such power the anomaly is presented of sovereign States which are compelled to create legislatures to be sovereign over the people who created them.

Sovereignty is not a matter of degree but of kind.

James Wilson (Journal of Massachusetts Convention, 1788, p. 364) says "In all governments . . . there must be a power established from which there is no appeal and which is, therefore, called absolute, supreme and incontrollable. The only question is where that power is lodged."

See also Charles Pinckney in South Carolina Debates (Elliot's Debates, Vol. IV, p. 327).

2. WHERE IS THE SOVEREIGNTY?

a. *IN THE PEOPLE.*

"The people are the only legitimate fountain of power." James Madison, Federalist No. XLIX.

"Our political creed is, without a dissenting voice that can be heard, that the will of the people is the source, and the happi-

ness of the people the end, of all legitimate government upon earth." John Quincy Adams in his first message to Congress.

In the United States the Supreme power "remains and flourishes with the people, and under the influence of that truth we at this moment sit, deliberate and speak.....that the supreme power, therefore, should be vested in the people is, in my judgment, the great panacea of human politics. It is a power paramount to their constitution, inalienable in its nature and indefinite in its extent."

James Wilson, Journal of Mass. Convention, 1788, p. 365.

"A share in the sovereignty of the State which is exercised by the citizens at large in voting at elections—in a Republic ought to stand foremost in the estimation of the law. It is that right by which we exist a free people.—That portion of the sovereignty to which each individual is entitled can never be too highly prized."

Hamilton, in Works, Vol. VI, p. 271.

"The legislatures have no power to ratify it. They are the mere creatures of the State constitutions and cannot be greater than their creators.—Whither then must we resort? *To the people, with whom all power remains that has not been given up in the constitutions derived from them.*" It was of great moment, he observed, that this doctrine should be cherished, *as the basis of free government.*

Geo. Mason of Virginia (Elliot's Debates V, p. 352).

Abraham Lincoln said in a speech at Peoria in 1854: "According to our ancient faith the just powers of government are derived from the consent of the governed. * * * Allow all the governed an equal voice in the government and that and that only, is self-government."

Charles Pinckney, one of the delegates in the Philadelphia Convention, spoke in the ratifying Convention of South Carolina (Elliot's Debates, Vol. IV, pp. 318, 326), as follows:

"We have been taught here to believe that all power of right belongs to the people; that it flows immediately from them, and is delegated to their officers for the public good; that our rulers are the servants of the people, amenable to their will and created for their use."

Speaking of the United Netherlands, he says:

"According to my idea of the word it is not a republic; for I conceive it as indispensable in a republic that all authority should flow from the people."

b. *PASSAGE FROM STATE TO PEOPLE.*

The idea of sovereignty in the people was not original with the makers of the constitution. Locke and Rousseau had long before expounded the principle.

It found its first great expression in the Declaration of Independence at the hands not of the people but of "the representatives of the United States of America in Congress assembled."

There is no doubt that the original conception of sovereignty by the colonies was that of corporate sovereignty. The articles of confederation were made not by the people but "between the States of New Hampshire, Massachusetts Bay, etc," and each State asserted therein "its sovereignty, freedom and independence."

The articles were prepared by a legislature which had no authority from the people, and they were referred for ratification not to the people but to the legislatures of the State. The submission by the people of this legislative usurpation in the framing of their national government shows how imperfect was the existing conception of popular sovereignty. The people had just formed their constitutions and hugged them as a dear possession secured by their blood and sufferings. They were jealous of their State independence, and the weak alliance of the confederation proved pitiably ineffective because the States would not trust sufficient delegation of national power.

"Oliver Ellsworth of Connecticut, said in the Federal Convention:

"As to the first point he observed that a *new set of ideas seemed to have crept in since the articles of confederation* were established. *Conventions of the people*, or with power derived expressly from the people, *were not then thought of*. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint."

On the first impact of independence and supreme authority, the State seemed to be the prize which revolution had secured. The confederation was a beginning not an end; constitutional confederation constituted progress in popular government. Yet it was but the opening of the expanding system of self-government which was to ripen into more perfect forms such as are represented in the full legislative sovereignty of the people of the State of Oregon under their amended constitution.

3. DIRECT EXERCISE OF SOVEREIGNTY BY THE PEOPLE.

a. *STATES ENTITLED TO CHOOSE THEIR FORMS.*

Webster described the unlimited power of sovereignty in his reply to Hayne:

"The people, sir, erected this government. * * * Gentlemen do not seem to recollect that the people have the power to do any thing for themselves."

George Washington said in his farewell address: "The basis of our political system is the right of the people to make and alter their constitutions of government."

"For I insist if there are errors in government, the people have the right not only to correct and amend them, but likewise totally to change and reject its form; and under the operation of that right the citizens of the United States can never be wretched beyond retrieve unless they are wanting to themselves."

James Wilson, Journal of Mass. Convention, 1788, p. 364.

The Declaration of Independence, to the principles of which all new States have been expressly required upon their admission to the Union to conform, asserts the supreme right of the people "to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

The people of Buckingham County instructed their delegates to the Virginia Convention, which first declared the independence of the colonies, in the words, "the Supreme Being hath left in our power to choose what government we please for our civil and religious happiness."

The bill of rights of the Massachusetts Constitution declares that by right, the people of the Commonwealth, "invest their legislature with authority" and "provide for an equitable mode of making laws."

b. *SOVEREIGNTY EXTENDS TO CONSTITUTIONS AND STATUTES.*

Constitutions are not limited to organic law.

Whatever may be the theoretical and aesthetic division between organic and statute law, this division, as to Constitutions is urged only by text-writers as a matter of policy, and nowhere has a court undertaken to limit constitutional conventions or constitutional amendments to organic law.

The original Constitutions of the States contain many provisions of a statutory nature, and since that time the practice has grown perhaps to an unreasonable extent; but the practice has its justification in the distrust of legislatures by the people and the necessity they have found of curbing ordinary legislative powers. That extensive provisions of a statutory character are not open to legal or political objection is notably evidenced by the admission of Oklahoma to the Union under a Constitution which is crowded with such provisions. The Courts likewise have not distinguished between such legislative provisions and organic laws.

Constitutional limitations of a statutory character are so extensive that upon analysis of the existing conditions they will be found to constitute the great bulk of constitutional texts. Examine Stimson "Constitutions."

The recognition of this power to enact legislation in constitutional form is a definite recognition of the full authority of the people of a State to enact legislation at their free will, and under such forms as they may constitutionally provide. Nowhere has this court or any other court undertaken to say in what exact form the people shall give expression to their sovereign will. The courts of some States, but not yet of the United States, have recognized that Constitutional conventions may even promulgate Constitutions without the ratification of even the preliminary consent of the people.

However questionable these decisions may be they illustrate the great possible exemptions from fixed forms which are allowed in expressing the popular will, even through the mere process of acquiescence. With how much greater reason is it accorded to the people in united action when they directly declare the law of the State?

No one questions the sufficiency of a Constitution which is ratified by the popular vote, and it seems immaterial and technical to inquire into the form in which popular action is thus expressed. It must be beyond question that if the people choose to determine Constitutional questions directly at the polls rather than through a convention, they have a power to do so, and it must be incontestable that the common practice of initiation of amendments by legislatures is a mere matter of convenience and not of principle. When, therefore, the people of Oregon fixed for themselves the method of popular initiation of Constitutional amendments and a direct vote at the polls upon such amendments, their power so to do cannot be questioned by any court.

It seems to be a necessary corollary to this statement that the people's power at the polls over questions of a statutory

nature is not any more limited than it would be in a Constitutional Convention. If it were otherwise, it would be demonstrated that there is somewhere a judicial or political inhibition upon the people in Constitutional assemblage to pass from a field of organic into a field of statutory enactment, but as is above suggested no such inhibition exists.

We are, therefore, dealing in this case with a mere matter of form which it requires very little ingenuity to change.

In the early history of the Plymouth Colony in 1638, the first experiment with legislation by delegates was made, and it was provided as to any laws which such delegates might enact, "That the freemen at the next eleccon court after meeting together may repeale the same and enact any other usefull for the whole."

The people of Oregon might copy from the Pilgrim Fathers and provide that at each election any laws passed by a previous legislature might be repealed. This would constitute an optional referendum of all legislative acts. Surely with a greater sovereign power than could ever be conceded to the Plymouth Colonists, the people of Oregon might declare that every election should constitute a Constitutional Convention of the people to propose and enact their own measures as well as to repeal those of the legislature. Such indeed is the practical operation, and it may be said, the legal effect of the constitutional provisions now in force in Oregon.

Each gathering of the people at election day is in effect a constitutional convention at which the sovereign powers of the people are only limited by their own Constitution and the Constitution of the United States.

Constitutions are creators of law—they are called organic law, because they contain the plan or means of government, and the making of a Constitution is legislation of the highest type. Legislatures cannot meddle with it.

Threadgill *v.* Cross, 109 Pac. Rep. 558 (Ok. 1910).

It is conceivable that a Constitution might put forth an entire code of the law, and leave no powers to a legislature, giving to the people locally or generally assembled or represented the sole power of alteration through amendment of the Constitution itself. It has not yet been decided that a permanent body of delegates, empowered to legislate, is an essential of a republican form of government. The town meeting still exists unchallenged, and nowhere does it appear that a city, a county and indeed a whole State may not act in like accord, if the people can find methods satisfactory to themselves.

If the perfection of the secret ballot system provides such a method, what prohibitions of ancient charters or customs shall avail against this form of legislating in the State.

c. *THE RIGHT OF DIRECT LEGISLATION.*

When this court inquires into the right of the people of Oregon to make their laws at the polls, it should do so in the spirit of Mr. Justice Holmes when he made similar inquiry as a justice of the Supreme Court of Massachusetts:

"I ask myself as the only question what words express or imply that a power to pass a law (subject to rejection by the people) is withheld." Opinions of Justices, 160 Mass. 594.

. . . "The Supreme power is in a democracy "inherent in the people and is either exercised by themselves or by their representatives." James Wilson, Elliot's Debates, Vol. II, p. 365.

Andrew Jackson, in his inaugural address, said: "Experience proves that in proportion as agents to execute the will of the people are multiplied there is danger of their wishes being frustrated. Some may be unfaithful; all are liable to err. So far, therefore, as the people can with convenience speak, it is safer for them to express their own will."

Commenting on the statement that the people who delegate power "have a *right to resume it*, and place it in other hands

or keep it themselves, whenever it is made use of to oppress them, &c." John Adams answered:

"These are what are called revolution principles. They are the principles of Aristotle and Plato, of Livy and Cicero and Sidney, Harrington and Locke; the principles of nature and eternal reason; the principles on which the whole government over us now stands. It is therefore astonishing, if anything can be so, that writers, who call themselves friends of government, should in this age and country be so inconsistent with themselves, so indiscreet, so immodest, as to insinuate a doubt concerning them." Works, Vol. IV, p. 14.

Jameson (Constitutions, p. 21) says:

"Sovereignty manifests itself in two ways, *first indirectly*, through individuals, acting as the agents or representatives of the sovereign and constituting the civil government; and *secondly, directly*, by organic movements of the political society itself without the ministry of agents."

"A portion of this sovereign power has been delegated to government which represents and speaks the will of the people so far as they *choose* to delegate their power."

Luther *vs.* Borden, 7 How. 29.

The sovereignty of the people being conceded the claim that the law making power can only be exercised through delegates has a fair parallel in the reasoning of the chambermaid, who insisted upon hanging a picture of the leaning tower of Pisa awry, and explained that she could only get the tower to hang straight by hanging the picture crooked.

The assertion that the sovereignty of the people is sufficiently exercised by a legislature, is well met in the words of Washington, when the Confederation was toppling and he was asked to use his influence:

"Influence is not government."

d. *OREGON IS A REPUBLIC.*

If the people reserve their original power to themselves and delegate to their agents only limited legislative functions, the republican form is not lost but perfected. The only test of such form is the supremacy of the popular will, and nowhere is it supreme except in the original exercise. Any uncontrolled delegation is a qualified or indirect supremacy.

A monarchy is not less a monarchy because the sovereign elects to act personally rather than through ministers; aristocratic sovereigns need not put their power out of their own hands in order to act effectively. By what token shall it be said that a sovereign people, constituting a republic, ceases to be republican, when it dispenses with delegates and acts directly?

Surely the people may grant such restricted power to their delegates as they choose, and powers not granted and thus reserved are not lost to the people. We cannot make any key fit such a lock.

There is no law, which sets the legislature above the people; not in the decisions of Courts, not in the Constitutions or the conventions which made or ratified them, not in early colonial history, where pure Democracy had been the foundation of government.

There is a rank incongruity in the propositions that in a republic the people must be sovereign, and that a government ceases to be a republic when the people refuse to delegate all their sovereign power of legislation to agents.

A people is not sovereign which has not the power to exercise its sovereignty, and a delegate body is the sovereign if it has power to deny to its principal the right to resume and exercise the delegated power. Only when the sovereign *voluntarily* relinquishes its right to exercise any sovereign function to delegates can the delegates have logical claim to possess the sovereign power. We call this voluntary relinquishment a constitution.

After a century of repetition of the evident truth that delegates of the sovereign function must trace their authority to the constitutional grant, the claim is now made, that our Re-

publican form has ceased to exist, and the republic has disappeared if the sovereign has declined to abdicate its full sovereign power to its agents, and chosen to reserve certain of such powers to itself, and indeed only power which is withdrawn upon the failure of the representatives to represent.

May not the sovereign say to his agents, "You must represent me, you must execute my will, or I shall exercise the power myself." If this illogical contention can stand, it must involve the downfall of the entire theory of popular sovereignty.

James Wilson whose influence in the federal convention and with the people of the States was second to none made brilliant and conclusive answer to the contention of this appellant. "No, sir, I have no right to imagine that the reflected rays of delegated power can displease by a brightness that proves the superior splendor of the luminary from which they proceed."

The People of Oregon have not been disappointed in the direct exercise of their sovereign functions. Nine other States have followed in their footsteps; the wisdom of their course is reflected in the laws they have thus enacted. Democracy has been vindicated; it promises to bring better government, better citizenship and a perfect republic. The people are fit to govern themselves; and are justifying the confidence and injunction of the martyred Lincoln.

" No men living are more worthy to be trusted than those who toil up from poverty; none less inclined to take or touch aught which they have not honestly earned. Let them beware of surrendering a political power which they already possess, and which, if surrendered, will surely be used to close the door of advancement against such as they, and to fix new disabilities and burdens upon them till all of liberty shall be lost."

GEO. FRED WILLIAMS,

Counsel for the States of California, Arkansas, Colorado, South Dakota and Nebraska, who pray to be heard as *amici curiae*.

Of Counsel for the State of Oregon.